ONTARIO
LABOUR RELATIONS BOARD
REPORTS

November/December 2007

Ontario

ONTARIO LABOUR RELATIONS BOARD

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LABOUR RELATIONS BOARD
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A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [2007] OLRB REP. NOVEMBER/DECEMBER

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also
reported in *Canadian Labour Relations Boards Reports,*
Butterworth & Co., Toronto.

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Abandonment – Representation Vote – Termination – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343... 1135

Accreditation – Construction Industry – Intervenor – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA... 1125

Bargaining Rights – Construction Industry – Employer Initiation – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on Tenaquip Ltd. that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and

the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 1106

Bargaining Rights – Employer Initiation – Practice and Procedure – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 1179

Bargaining Unit – Build-Up – Certification – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) 1015

Bargaining Unit – Certification – Employee – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE OF CANADA 1151

Build-Up – Bargaining Unit – Certification – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) 1015

Certification – Bargaining Unit – Build-Up – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) 1015

Certification – Bargaining Unit – Employee – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE OF CANADA 1151

Certification – Construction Industry – Employee – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891 1075

Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 1079

Certification – Construction Industry – Practice and Procedure – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1037

Certification – Construction Industry – Practice and Procedure – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1040

Certification – Construction Industry – Practice and Procedure – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1168

Certification – Construction Industry – Representation Vote – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 1030

Certification – Construction Industry – Unfair Labour Practice – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3) the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

VANSMIT LTD. O/A JAY-DEE CONCRETE FORMING; RE LIUNA, LOCAL 625 . 1164

Certification – Practice and Procedure -- Representation Vote – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s. 8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

WILLIAM DAY CONSTRUCTION LIMITED RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 1183

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 1197

Construction Industry – *Prima Facie* Motion – Related Employer – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

TITAN CONTRACTING; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND ALLIED TRADES UNITED BROTHERHOOD OF CARPENTERS, LOCAL 494; RE PARAMOUNT HOMES INC.; RE PORTOFINO CORPORATION; RE LIUNA, LOCAL 625 1140

Construction Industry – Accreditation – Intervenor – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE

CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1125

Construction Industry – Bargaining Rights – Employer Initiation – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on Tenaquip Ltd. that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 1106

Construction Industry – Certification – Employee – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891 1075

Construction Industry – Certification – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's prima facie motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by

Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 1079

Construction Industry – Certification – Practice and Procedure – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1037

Construction Industry – Certification – Practice and Procedure – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1040

Construction Industry – Certification – Practice and Procedure – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1168

Construction Industry – Certification – Representation Vote – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 1030

Construction Industry – Certification – Unfair Labour Practice – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3) the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

VANSMIT LTD. O/A JAY-DEE CONCRETE FORMING; RE LIUNA, LOCAL 625 . 1164

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 1197

Construction Industry Grievance – Estoppel – The union filed two grievances alleging that Jacobs had performed work incorrectly under the General Presidents' Maintenance Agreement rather than under the provincial ICI agreement for construction, and its members were thereby deprived of higher wage rates – Jacobs argued that the work was properly characterized as maintenance or, in the alternative, the union should be estopped from its claim for relief, or the relief should be significantly reduced because of the late filing of the grievances – A majority of the Board found that work performed on existing equipment and machinery, including replacement of individual items, was maintenance – The changes undertaken by Jacobs did not involve enhancements or additions to a production process; there was no replacement of an entire system, and the change was not designed to increase production – On the other hand, the erection of a new blast-proof shelter and the installation of related cabling for the burner management system was construction; similarly the electrical work around the chloride mitigation tower, as well as the work associated with its new exchangers, was construction – Examining the employer's estoppel argument, the Board held that there is a distinction between an estoppel against the application of a provincial agreement and the estoppel against the application of a public statute: in specific circumstances, based on equity, it might be unconscionable for a particular beneficiary of rights under a provincial agreement to enforce those rights – In this case, the work contemplated by Petro-Canada and Jacobs was maintenance, the various trades were consulted and agreement was reached, and the work was performed without complaint by other than the applicant – The Board found that the union's representative had agreed that the projects would be conducted as maintenance, and that Jacobs had relied on this representation to its detriment –The estoppel argument succeeded - Grievances dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LTD.; RE IBEW, LOCAL 353; RE GENERAL PRESIDENTS MAINTENANCE COMMITTEE FOR CANADA AND THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO 1043

Construction Industry Grievance – Health and Safety – The union complained that the employer had requested an additional drywaller, then chose not to hire the worker when it learned he did not have fall arrest training, a requirement under the *Occupational Health and Safety Act* which would qualify him as a "competent worker" – The Board found that the collective agreement at the time did not require fall arrest training for workers for them to be considered competent, therefore the employer had no legitimate reason to consider the dispatched worker not competent – The collective agreement did contemplate, however, that the employer retained the exclusive right to make decisions regarding hiring and staffing levels – Although the employer requested an additional worker, it did not hire the employee referred from the hiring hall and ultimately used only its existing complement to complete its contract – The employer did not violate the collective agreement by failing to employ the worker – But because the worker sent to the employer was competent, the union was entitled to damages under the collective agreement for the referral – Grievance allowed in part

ROSMAR DRYWALL & ACOUSTICS LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 1092

Dependent Contractor – Employee – Employment Standards – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the Employment Standards Act – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS 1098

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC); RE WALLACEBURG PREFERRED PARTNERS CORP. 1174

Duty of Fair Representation – Judicial Review – Leave to Appeal Refused

STEPHANE VERREAULT; RE OLRB; RE TEAMSTERS LOCAL UNION 419, UA LOCAL 787 1210

Employee – Bargaining Unit – Certification – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE OF CANADA 1151

Employee – Certification – Construction Industry – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891 1075

Employee – Dependent Contractor – Employment Standards – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the Employment Standards Act – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS 1098

Employer Initiation – Bargaining Rights – Construction Industry – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on *Tenaquip Ltd.* that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 1106

Employer Initiation – Bargaining Rights – Practice and Procedure – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF

AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 1179

Employment Standards – Dependent Contractor – Employee – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the Employment Standards Act – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS 1098

Employment Standards – Judicial Review – The Board found that the employee was not guilty of wilful misconduct, disobedience or wilful neglect of duty – After a change of supervisors which brought about a change in company policy, the employee believed he still could sell used, non-warranty catalytic converters for his own benefit – The Board found his discharge was caused by a misunderstanding, granted the employee's appeal, and ordered the employer to pay termination pay – On judicial review the Court found the Board was entitled to come to the conclusion on the evidence – Application dismissed

ONTARIO LIMITED o/a OAKVILLE HONDA; RE CREYOS BATCHELOR AND OLRB.. 1210

Employment Standards – Reconsideration – Timeliness – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

JOE BONE'S GRILL INC.; RE GIUSEPPE F. TEDESCO AND DIRECTOR OF EMPLOYMENT STANDARDS.. 1065

Employment Standards – Settlement – The employee (one of three co-defendants in a civil action by the employer alleging breach of contract, conspiracy and theft) signed an affidavit in support of a motion in the civil action referring to the fact that the employer had stopped payment on her last pay cheque – The employee's *ESA* complaint was known to the parties when the lawsuit was settled and all three defendants entered into a standard release "from any and all claims" with respect to the court file – The employer submitted that the employee was barred from filing the claim pursuant to s. 98 and because she had already received a benefit under the settlement – First the Board found that an interlocutory motion by a defendant in a civil action is not the commencement of a civil proceeding and accordingly does not bar her claim under s. 98 – Second, the release did not specifically reference the *ESA*, and it easily could have, given the parties' knowledge of the claim – Accordingly, the release was no impediment to the employee's claim – Application dismissed, order to pay confirmed

TOTAL DEBT FREEDOM INC.; RE REBECCA DAVIS AND DIRECTOR OF EMPLOYMENT STANDARDS.. 1147

Employment Standards – The employee appealed a decision of an employment standards officer not to award her termination pay and the amount of her last pay cheque - The Board found that the employee, a teenager working her first job, had wrongly entered a customer's bill payment but the conduct did not amount to wilful or deliberate misbehaviour to disentitle her to termination pay – The Board further found that the employer caused or coerced the employee to sign over her final pay cheque to it, constituting an unlawful deduction contrary to the Act – However, the Board found that the forty dollars cash the employer asked the employee to hand over from her wallet (under threat of legal action) during the termination meeting was not wages, accordingly, the Board was without jurisdiction to order the return of these funds – Application allowed

LINIS SALES INC. O/A CANADIAN TIRE AND DIRECTOR OF EMPLOYMENT STANDARDS; RE TANYA PHILLIPS 1071

Estoppel – Construction Industry Grievance – The union filed two grievances alleging that Jacobs had performed work incorrectly under the General Presidents' Maintenance Agreement rather than under the provincial ICI agreement for construction, and its members were thereby deprived of higher wage rates – Jacobs argued that the work was properly characterized as maintenance or, in the alternative, the union should be estopped from its claim for relief, or the relief should be significantly reduced because of the late filing of the grievances – A majority of the Board found that work performed on existing equipment and machinery, including replacement of individual items, was maintenance – The changes undertaken by Jacobs did not involve enhancements or additions to a production process; there was no replacement of an entire system, and the change was not designed to increase production – On the other hand, the erection of a new blast-proof shelter and the installation of related cabling for the burner management system was construction; similarly the electrical work around the chloride mitigation tower, as well as the work associated with its new exchangers, was construction – Examining the employer's estoppel argument, the Board held that there is a distinction between an estoppel against the application of a provincial agreement and the estoppel against the application of a public statute: in specific circumstances, based on equity, it might be unconscionable for a particular beneficiary of rights under a provincial agreement to enforce those rights – In this case, the work contemplated by Petro-Canada and Jacobs was maintenance, the various trades were consulted and agreement was reached, and the work was performed without complaint by other than the applicant – The Board found that the union's representative had agreed that the projects would be conducted as maintenance, and that Jacobs had relied on this representation to its detriment –The estoppel argument succeeded - Grievances dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LTD.; RE IBEW, LOCAL 353; RE GENERAL PRESIDENTS MAINTENANCE COMMITTEE FOR CANADA AND THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO 1043

Health and Safety – Construction Industry Grievance – The union complained that the employer had requested an additional drywaller, then chose not to hire the worker when it learned he did not have fall arrest training, a requirement under the *Occupational Health and Safety Act* which would qualify him as a "competent worker" – The Board found that the collective agreement at the time did not require fall arrest training for workers for them to be considered competent, therefore the employer had no legitimate reason to consider the dispatched worker not competent – The collective agreement did contemplate, however, that the employer retained the exclusive right to make decisions regarding hiring and staffing levels – Although the employer requested an additional worker, it did not hire the employee referred from the hiring hall and ultimately used only its existing complement to complete its contract – The employer did not violate the collective agreement by failing to employ the worker – But because the worker sent to the employer was competent, the union was entitled to damages under the collective agreement for the referral – Grievance allowed in part

ROSMAR DRYWALL & ACOUSTICS LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18.. 1092

Health and Safety – Interim Relief – The employer sought an appeal and suspension of an Order made by an Inspector – At issue were what measures are necessary to protect the health and safety of nurses required to enter areas that are undergoing a "level 2 or higher" search for weapons in a correctional centre – The Board invoked its interim relief powers under the OHSA: (1) relieving the employer of its obligation to purchase custom-made vests for the Nurses; (2) instead, requiring the employer to provide Nurses who deliver medication in cells during searches with a vest that fits reasonably well; and (3) ordering the employer to continue the "delivery of essential medications during searches in cellular accommodation areas" in accordance with its own memorandum – In light of the interim order, the suspension was granted – Appeal continues

CENTRAL NORTH CORRECTIONAL CENTRE ; RE OPSEU AND INSPECTOR JOE ZAHER.. 1029

Interim Relief – Constitutional Law – Intervenor – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 1197

Interim Relief – Discharge for Union Activity – Unfair Labour Practice – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC); RE WALLACEBURG PREFERRED PARTNERS CORP. 1174

Interim Relief – Health and Safety – The employer sought an appeal and suspension of an Order made by an Inspector – At issue were what measures are necessary to protect the health and safety of nurses required to enter areas that are undergoing a "level 2 or higher" search for weapons in a correctional centre – The Board invoked its interim relief powers under the OHSA: (1) relieving the employer of its obligation to purchase custom-made vests for the Nurses; (2) instead, requiring the employer to provide Nurses who deliver medication in cells during searches with a vest that fits reasonably well; and (3) ordering the employer to continue the "delivery of essential medications during searches in cellular accommodation areas" in accordance with its own memorandum – In light of the interim order, the suspension was granted – Appeal continues

CENTRAL NORTH CORRECTIONAL CENTRE ; RE OPSEU AND INSPECTOR JOE ZAHER 1029

Intervenor – Accreditation – Construction Industry – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1125

Intervenor – Constitutional Law – Interim Relief – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 1197

Judicial Review – Constitutional Law – Interim Relief – Intervenor – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 1197

Judicial Review – Construction Industry – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 1197

Judicial Review – Employment Standards – The Board found that the employee was not guilty of wilful misconduct, disobedience or wilful neglect of duty – After a change of supervisors which brought about a change in company policy, the employee believed he still could sell used, non-warranty catalytic converters for his own benefit – The Board found his discharge was caused by a misunderstanding, granted the employee's appeal, and ordered the employer to pay termination pay – On judicial review the Court found the Board was entitled to come to the conclusion on the evidence – Application dismissed

ONTARIO LIMITED o/a OAKVILLE HONDA; RE CREYOS BATCHELOR AND OLRB.......... 1210

Judicial Review – Jurisdictional Dispute – Natural Justice – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA –The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE COMSTOCK CANADA LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527, ONTARIO LABOUR RELATIONS BOARD, BRUCE POWER LP.......... 1197

Judicial Review – Duty of Fair Representation – Leave to Appeal Refused

STEPHANE VERREAULT; RE OLRB; RE TEAMSTERS LOCAL UNION 419, UA LOCAL 787.......... 1210

Jurisdictional Dispute – Judicial Review – Natural Justice – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA –The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE COMSTOCK CANADA LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527, ONTARIO LABOUR RELATIONS BOARD, BRUCE POWER LP.......... 1197

Membership Evidence – Certification – Construction Industry – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer",

hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486.................................... 1079

Natural Justice – Jurisdictional Dispute – Judicial Review – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA –The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE COMSTOCK CANADA LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527, ONTARIO LABOUR RELATIONS BOARD, BRUCE POWER LP.. 1197

Practice and Procedure – Bargaining Rights – Employer Initiation – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF

AMERICA; AND THE FOLLOWING LOCAL UNIONS; 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 1179

Practice and Procedure – Certification – Construction Industry – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1037

Practice and Procedure – Certification – Construction Industry – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1040

Practice and Procedure – Certification – Construction Industry – Employee – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891 1075

Practice and Procedure – Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 1079

Practice and Procedure – Certification – Construction Industry – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1168

Practice and Procedure – Certification – Representation Vote – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s. 8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

WILLIAM DAY CONSTRUCTION LIMITED RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 1183

Prima facie motion – Certification – Construction Industry – Membership Evidence – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 1079

Prima Facie Motion – Construction Industry – Related Employer – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

TITAN CONTRACTING; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND ALLIED TRADES UNITED BROTHERHOOD OF CARPENTERS, LOCAL 494; RE PARAMOUNT HOMES INC.; RE PORTOFINO CORPORATION; RE LIUNA, LOCAL 625 1140

Public Sector Labour Relations Transition Act – Construction Industry – Judicial Review – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 1197

Public Service Labour Relations Transition Act - ONA sought a declaration that s. 9 of the PSLRTA applied to the Kensington Eye Institute, a not-for-profit corporation licensed by the Ministry of Health and Long Term Care as an independent health facility – The Board found that the Institute was opened in January 2006 and the amendments to s. 9 of the Act that would be applicable to its operation were not enacted until March – Notwithstanding that the Institute was clearly part of the government's health restructuring strategy, the health services integration was an event that occurred prior to the amendments, therefore the Board found that the Act did not apply – Application dismissed

THE KENSINGTON EYE INSTITUTE; RE ONTARIO NURSES' ASSOCIATION; UNIVERSITY HEALTH NETWORK, MOUNT SINAI HOSPITAL; SUNNYBROOK HEALTH SCIENCES CENTRE, C.U.P.E. LOCAL 5001 AND SEIU LOCAL 1 1117

Reconsideration – Employment Standards – Timeliness – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

JOE BONE'S GRILL INC.; RE GIUSEPPE F. TEDESCO AND DIRECTOR OF EMPLOYMENT STANDARDS 1065

Reference – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 1197

Related Employer – Construction Industry – *Prima Facie* Motion – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

TITAN CONTRACTING; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND ALLIED TRADES UNITED BROTHERHOOD OF CARPENTERS, LOCAL 494; RE PARAMOUNT HOMES INC.; RE PORTOFINO CORPORATION; RE LIUNA, LOCAL 625 1140

Related Employer – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 1197

Remedies – Certification – Construction Industry – Representation Vote – Unfair Labour Practice – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 1030

Representation Vote – Abandonment – Termination – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343 1135

Representation Vote – Bargaining Unit – Build-Up – Certification – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

CAPITAL TOOL & DESIGN LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) 1015

Representation Vote – Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by

Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 1079

Representation Vote – Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1037

Representation Vote – Certification – Construction Industry – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 1030

Representation Vote – Certification – Practice and Procedure – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s.

8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

WILLIAM DAY CONSTRUCTION LIMITED RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 1183

Sale of Business – Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW LOCAL 773; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 6; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND ONTARIO LABOUR RELATIONS BOARD 1197

Settlement – Employment Standards – The employee (one of three co-defendants in a civil action by the employer alleging breach of contract, conspiracy and theft) signed an affidavit in support of a motion in the civil action referring to the fact that the employer had stopped payment on her last pay cheque – The employee's *ESA* complaint was known to the parties when the lawsuit was settled and all three defendants entered into a standard release "from any and all claims" with respect to the court file – The employer submitted that the employee was barred from filing the claim pursuant to s. 98 and because she had already received a benefit under the settlement – First the Board found that an interlocutory motion by a defendant in a civil action is not the commencement of a civil proceeding and accordingly does not bar her claim under s. 98 – Second, the release did not specifically reference the *ESA*, and it easily could have, given the parties' knowledge of the claim – Accordingly, the release was no impediment to the employee's claim – Application dismissed, order to pay confirmed

TOTAL DEBT FREEDOM INC.; RE REBECCA DAVIS AND DIRECTOR OF EMPLOYMENT STANDARDS 1147

Standing – Accreditation – Construction Industry – Intervenor – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA 1125

Status – Certification – Construction Industry – Employee – Practice and Procedure – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

MELANDI DRYWALL SYSTEM INC.; RE IUPAT, LOCAL 1891 1075

Termination – Abandonment – Representation Vote – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343 1135

Termination – Bargaining Rights – Construction Industry – Employer Initiation – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on *Tenaquip Ltd.* that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 1106

Termination – Bargaining Rights – Employer Initiation – Practice and Procedure – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

WALLS.COM INC.; RE DARREN CATES; RE THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTER'S AND JOINERS OF AMERICA AND ITS LOCAL 494 AND CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL AND GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS AND UNITED BROTHERHOOD OF CARPENTER'S AND JOINTERS OF AMERICA; AND THE FOLLOWING LOCAL UNIONS: 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 AND 2486 1179

Timeliness – Abandonment – Representation Vote – Termination – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

TICKETMASTER CANADA LTD.; RE CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION LOCAL 343 1135

Timeliness – Employment Standards – Reconsideration – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

JOE BONE'S GRILL INC.; RE GIUSEPPE F. TEDESCO AND DIRECTOR OF EMPLOYMENT STANDARDS.. 1065

Unfair Labour Practice – Certification – Construction Industry – Representation Vote – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

DOUBLE H CONCRETE FORMING; RE LIUNA, LOCAL 1059 1030

Unfair Labour Practice – Certification – Construction Industry – Practice and Procedure – Representation Vote – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1037

Unfair Labour Practice – Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 1079

Unfair Labour Practice – Certification – Construction Industry – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3) the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

VANSMIT LTD. O/A JAY-DEE CONCRETE FORMING; RE LIUNA, LOCAL 625 . 1164

Unfair Labour Practice – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 1197

Unfair Labour Practice – Discharge for Union Activity – Interim Relief – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled *according to seniority – The union sought interim reinstatement pursuant to s. 98 of the* Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC); RE WALLACEBURG PREFERRED PARTNERS CORP.. 1174

0858-07-R United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Applicant v. **Capital Tool & Design Limited**, Responding Party

Bargaining Unit – Build-Up – Certification – Representation Vote – The union applied to certify a bargaining unit of employees employed at the employer's City of Vaughan site – The employer argued that the appropriate bargaining unit description should include both the City of Vaughan and the City of Brampton since it was about to transfer its remaining employees from the Brampton location to the new Vaughan facility – According to the employer, excluding the remaining Brampton employees would prevent them from having a say in whether they wished to be represented – In the alternative, the employer argued that the Board should hold a second representation vote under the build-up doctrine – The Board found that the consequences of not allowing the Brampton employees to have a say in the representation vote did not justify a departure from the Board's normal practice in limiting the geographic scope of a bargaining unit to one municipality – The Board also found that the size of the build-up only represented 16 percent of the total number of employees who were employed at both locations on the date of the application rather than the 50 percent found to be appropriate in earlier jurisprudence – Therefore, the number of employees employed in the bargaining unit on the date of the application was sufficiently representative of the employees in the ultimate bargaining unit – The bargaining unit applied for was appropriate – Certification granted

BEFORE: *Caroline Rowan*, Vice-Chair, and Board Members *P. LeMay* and *R.R. Montague*.

APPEARANCES: *Robert Champagne, Heather Ann McConnell, Qui Van Trieu* and *Brando Paris* appeared on behalf of the applicant; *Chris White, Gilberto Milanese, Anna Mario Campoli* and *Andrea Bezaire* appeared on behalf of the responding party.

DECISION OF THE BOARD; November 19, 2007

1. This is an application for certification filed under the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "Act") by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) ("the union") in respect of a unit of employees of the responding party, Capital Tool & Design Limited ("the employer"). The application was filed on June 4, 2007.

2. At the hearing in this matter, the parties addressed two outstanding issues. The first related to the appropriate bargaining unit description and, in particular, whether the geographic scope of the unit should include both the City of Vaughan and the City of Brampton as urged by the responding party or simply the City of Vaughan as proposed in the application. The second issue concerned the responding party's alternative position that the Board should exercise its discretion, having regard to the build up doctrine, either to order a second deferred vote or to count the segregated ballots of those employees who were transferred from the responding party's Brampton location to its Vaughan location after the date of application.

3. By decision dated July 20, 2007, the Board determined that the appropriate scope of the bargaining unit is the one sought by the applicant and that the responding party's alternative

position concerning the application of the doctrine of build up should be rejected. This decision sets out the Board's reasons for that ruling.

Relevant Background Facts

4. The parties reached agreement on the relevant facts and submitted the following agreed statement of facts:

AGREED STATEMENT OF FACTS

BACKGROUND

1. The Applicant, United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (hereinafter "USW") is a trade union representing employees in a wide variety of workplaces including those in the manufacturing sector.

2. The Responding Party, Capital Tool & Design Limited (hereafter 'CTD') is a manufacturer of various automotive brake parts for both the original and replacement markets. CTD is headquartered at a manufacturing facility located at 270 Spinnaker Way in the City of Vaughan, Ontario (near the intersection of Dufferin Avenue and the 407).

3. Since 2004 CTD has been involved in a number of transactions with other corporations engaged in the manufacture of automotive brake parts. Specifically, in May, 2004 CTD acquired Tabco Auto Brake Co. Limited (hereafter "Tabco") located in the city of Brampton, Ontario. In January, 2005 CTD acquired All Metal Machine Specialties (hereafter "All Metal") which was located in the City of Vaughan, Ontario. The Brampton location is approximately 20 kilometres from 270 Spinnaker Way. Attached at Tab 1 is a page from the CTD web-site detailing the nature of CTD's business and identifying the acquisition of Tabco and All Metal.

4. Following its acquisition of Tabco and All Metal, CTD undertook a three-phase integration of the various operations. As of September 27, 2005 CTD was operating out of ten different buildings in the Cities of Brampton and Vaughan. CTD opened a new office and manufacturing building at 270 Spinnaker Way (hereafter referred to as "the Vaughan Location") in the spring of 2006. The three-phase integration of manufacturing operations occurred as follows:

Phase I

Fine-blanking operations, warehouse and hardware from CTD and former All Metal operations transferred to the Vaughan Location in the spring of 2006 with completion of the transfer by June 30, 2006.

Phase II

Conventional stamping operations from CTD transferred to the Vaughan Location in the period commencing October, 2006 with completion of the transfer by February, 2007.

Phase III

Brake-shoe manufacturing from former Tabco operation commenced transferring to 270 Spinnaker Way during June 2007 and is scheduled to be completed by July 27, 2007.

5. On January 1, 2005 Tabco ceased to exist as a separate company and was amalgamated into CTD. Between May, 2004 and June 4, 2007 (hereafter "the Application date"), all aspects of the Tabco and All Metal businesses were centralized in CTD, save and except the manufacturing operations (ie. equipment and operating personnel) located in Brampton. For example, payroll, accounting, purchasing, sales and marketing, engineering, human resources and general administration functions and processes were standardized and run out of the CTD head office (located at 270 Spinnaker Way as of August 10, 2006).

THE TRANSFER OF THE BRAMPTON OPERATION

6. With respect to Phase III of the integration, CTD obtained the necessary approvals from its parent corporation on February 12, 2007. The initial planning as of March 15, 2007 contemplated the completion of the transfer of the shoe manufacturing operations located in Brampton ("the Brampton operations") to the Vaughan Location by April 27, 2007 (Tab 2).

7. The completion of the transfer of Brampton operations did not occur as scheduled due to delays associated with the required reconfiguration of the production floor at the Vaughan Location and issues involving arrangement for sufficient supply of hydro. As of May 9, 2007 the transfer date was amended to be complete as of June 8, 2007 (Tab 3 at page 4, line 117).

8. Preparation of the plant at the Vaughan Location was completed as of May 29, 2007. The transfer of equipment began June 6, 2007 and was completed on June 8,2007 except as noted in paragraph 18, below.

9. The schedule for the transfer of the Brampton operations to the Vaughan Location was intended to accommodate CTD's plan to hold a week-long open house for its customers during the week commencing Monday, June 18, 2007.

10. Subsequent to May 29, 2007, CTD determined that the completion of the transfer of the Brampton operations could not be assured so as to allow the open house to proceed and, therefore, the open house was re-scheduled to occur during the week commencing July 16, 2007.

11. As part of the transfer process, CTD had to reconfigure its production floor to accommodate the addition of presses and associated machinery from the Brampton operations as well as arrange for electrical supply to this equipment. This reconfiguration of the production floor commenced in March, 2007 and was completed by May 29, 2007 (see Tab 4, page 2, lines 45-53). Machinery from the Brampton operations as currently located at the Vaughan Location is pictured at Tab 8.

THE BRAMPTON EMPLOYEES

12. Employees at the Brampton operations were first advised of the proposed transfer of operations to the Vaughan Location by a memorandum dated March 11, 2007 which was posted in the lunchroom and locker rooms. A copy of the memorandum is set out at Tab 5.

13. On March 12, 2007, CTD's General Manager of the Brake Shoe Division, Ivan Rotella, held general meetings with all employees on the two shifts at the Brampton location and confirmed the information set out in his memorandum of the previous day.

14. As of the Application date, there were 49 hourly-rated employees employed at the Brampton operations and 259 hourly-rated employees employed at the Vaughan Location.

15. Commencing on June 8, 2007 and ending on July 3, 2007, CTD provided 47 of the hourly-rated employees from the Brampton operations with a standard letter advising that they were to be transferred to the facility at the Vaughan Location effective for that employee's next scheduled shift. Each employee was required to provide their acceptance in writing. These letters were in the same form as those used in integrations occurring in Phase I and Phase II. A copy of the standard letter is set out at Tab 6.

16. On or about June 11, 2007, 21 of the employees from the Brampton operations had commenced working at the Vaughan Location. They are:

Rajeswary Kaliugavarathan - 06/09
Ilyas Desai - 06/09
Raveenthrakumar Thuraisingam - 06/11
Wlawyslaw Ziobro - 06/11
Anojan Rajendran - 06/11
Anthonippllai Ananthanayakam - 06/11
Pushpamalar Srikantha - 06/11
Constantino De Angelis - 06/11
Luigi Greco - 06/11
Davinder Malhotra - 06/11
Wagdy Rofail - 06/11
Kaliugavarathan Velupillai - 06/09
Syedadil Zaidi - 06/11
Andre Balutiu - 06/11
Srikantharajah Velupillai - 06/11
Amandeep Brar - 06/11
Annaluxmy Gnanasegaram - 06/11
Manu Chacko - 06/11
Frank Gallo - 06/11
Joseph Sibichen - 06/11
Biagio Gagliano - 06/11

16.b The following 23 employees at the Brampton operations commenced working at the Vaughan Location as follows:

Charles Okine - 06/14
Tadeusz Pluto - 06/14
Luigi Turchetta - 06/16
Luis Padilla - 06/18
Yogarajah Sithamparapilla - 06/19
Michael Obaseki - 06/19
Vladimir Linardic - 06/22
Emilio De Tommaso - 07/04
Francesco Esposito - 07/04
Clive Malcolm - 07/04
Bella Varga - 07/04
Manuel Rogado - 07/04
Mourad Rofail - 06/14
Luis Moyano - 06/14
Vangjush Treska - 06/18
Nadarajah Sivathasan - 06/19
Godfrey Irabor - 06/19
Lucas Agboola -06/19
Damir Horvat - 06/22
Francisco Saa - 07/04
Dan Basaraba - 07/04
Clement Stephens - 07/04
Florin Borza - 07/04

17. There are five employees from the Brampton operations for whom CTD does not have fully executed offer letters with acceptance. One of these employees, Amarjit Lally, resigned his employment with CTD on June 16, 2007. Subject to direction from the panel of the Board hearing this matter, the parties believe that findings of fact respecting these five employees would not be determinative of the legal rulings to be made by the Board and are prepared to make argument without such a finding. This joint position is subject to the right of each of the parties to lead evidence and require a finding of fact respecting the five individuals should that prove necessary or be required by the Board. The five employees are:

Rakesh Pathak
John Thuruthumkara
Nada Mogus
Sivasubramaniam Lakshmanan
Amarjit Lally

18. As of July 4, 2007 the parties agree that 44 of the employees from the Brampton operations had commenced working at the Vaughan Location. At present three or four Brampton employees are completing a work assignment for a single customer of CTD at the Brampton operations which necessitates that each such employee works one or two shifts per week with the balance of their work week being carried out at the Vaughan Location. This work assignment was necessitated by the concern of the customer that the transition be otherwise completed before its work was transferred. The work assignment will cease as of July 27, 2007 and the remaining equipment utilized will be transferred to the Vaughan Location. No further operations will be carried out at the Brampton operations which will be effectively shut down. CTD provided notice of termination to the landlord of the premises of the Brampton operations in March, 2007 in accordance with the terms of the lease.

UNION CAMPAIGNS

19. In or about May, 2006, USW organizers leafleted outside the Brampton location. No Application for Certification was made in respect of the Brampton workplace.

> 20. On or about February 27, 2007 the USW commenced its organizing campaign at CTD's location at the Vaughan Location by leafleting the plant. Employees signed membership cards throughout April, May and June of 2007, before the Union applied for certification on the Application Date. A copy of USW campaign material provided to CTD workers at the Vaughan Location in February and May, 2007 is attached at Tab 7.

Appropriate Bargaining Unit

5. The union filed the present application for certification on June 4, 2007 and applied to represent the following bargaining unit of employees of the responding party:

> all employees of Capitol Tool & Design Limited in the City of Vaughan, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff.

The responding party took the position that the appropriate bargaining unit description includes both the municipal designation of the City of Vaughan and of the City of Brampton having regard to the fact that the employer had been operating out of two locations in two municipalities.

6. It was common ground between the parties that the Board does not consider whether the bargaining unit applied for by the applicant in a certification application is the most appropriate bargaining unit, but rather considers whether the unit proposed is *an* appropriate bargaining unit. In *Burns International Security Services Limited*, [1994] OLRB Rep. April 347, the Board explained its approach as follows:

> 28. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizaing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.
>
> 29. These goals must be harmonized within a framework that now recognizes (as early Board "policies" might not) that there is no single unique and indisputably "appropriate" unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) "serious labour relations problems". A trade union need not seek to represent the *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit that it applies for. The focus is on concrete problems rather than the sometimes nebulous concept of "community of interest".

The Board will therefore generally grant the unit applied for unless that unit will pose serious labour relations difficulties for the employer.

7. In the present case, the employer submitted that serious labour relations problems would result if the bargaining unit applied for were granted. While the employer acknowledged that the Board's normal practice is to look at an appropriate unit in terms of the municipal boundaries within which the employer's business is located, it submitted that an exception is warranted in the present case. In this regard, the employer noted that it is a company based in Concord Ontario in the City of Vaughan and that, in May of 2004, it acquired another auto brake company, Tabco Auto Brake Co. Limited, in the adjacent municipality in the City of Brampton. The employer planned to transfer the Brampton operations to the Vaughan location. That transfer involved a movement of both equipment and employees. The employees working at the Brampton location were first informed about the proposed move to the Vaughan location on or about March 11, 2007. However, the transfer to the Vaughan location was not yet complete at the time the application for certification was filed on June 4, 2007.

8. As of the date of application, there were 49 hourly-rated employees employed at the Brampton location ("Brampton Employees") and 259 hourly rated employees employed at the Vaughan location ("Vaughan Employees"). From June 8 to July 3, 2007, which was shortly after the certification application was filed, the employer provided 47 of the Brampton Employees with standard letters indicating that they were to be transferred to the Vaughan location on their next scheduled shift. By July 4, 2007, 44 of these Brampton Employees had commenced working at the Vaughan location. Three or four Brampton Employees continued to work one or two shifts a week at the Brampton location and spent the balance of their work week at the Vaughan location. Notice to the landlord was given to terminate the lease at the Brampton location in March 2007. It was anticipated that no further work would be performed at the Brampton location after July 27, 2007.

9. The employer argued that concrete labour relations problems would arise if the bargaining unit were restricted to the City of Vaughan, since doing so would preclude the Brampton Employees from having a say in whether they wish to be represented by the applicant. The employer referred to the results of the representation vote in support of its position that the Board should find that a wider bargaining unit is appropriate in the circumstances of this case. The employer noted that, of the 246 Vaughan Employees who voted, 123 voted in favour of the union, 121 voted against and there were two spoiled ballots. In the employer's submission, the fact that the union won the vote by a "razor's edge" is relevant to the Board's determination of the appropriate bargaining unit description. The employer also contended that it can be inferred from the agreed facts that, at the time the union filed its application, the union was aware of the employer's Brampton location and of the preparations being made at the Vaughan facility to accommodate the transfer.

10. The geographic scope of the bargaining unit proposed by the applicant in this case was consistent with the Board's normal practice of defining bargaining units in terms of the single municipality in which the employer's facility is located. In *K Mart Canada Limited,* [1981] OLRB Rep. September 1250, the Board explained its approach to the exercise of its discretion under what is now section 9(1) of the Act when circumscribing the geographic scope of bargaining rights, as follows:

> 9. Nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which the employer operates. Where there is only one location within a municipality

> the board will define the unit in terms of all employees within the municipality. Under a regime of municipal-wide certification bargaining rights follow an expansion or relocation of the business within the municipality; but not beyond. The sites within the municipality is sacrificed in favour of the stability of the bargaining rights conferred by certificate. (sic) However, these rights do not extent (sic) beyond the municipality to select a bargaining agent of their choice. The use of the municipal boundary represents an attempt by the Board to strike a rough balance between stable bargaining structures and individual freedom of choice.

The Board's practice reflects a balancing of different statutory objectives including creating and maintaining viable bargaining units and the right to choose one's bargaining agent. It also has the benefit of providing a measure of predictability to the parties, which in turn provides less opportunity for conflict and discourages litigation and gerrymandering. (*Coreslab Structures (Ont) Inc.*, [2003] OLRB Rep. May/June 407 (May 13, 2003)). However, as noted by the Board in *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656, this fairly rigid practice is not without its exceptions.

11. In *Dynamic Closures Limited*, [1983] OLRB Rep. April 521, the Board found it appropriate to grant a wider geographic description at the request of the applicant in circumstances where the employer planned to move its facility within a few months. In that case, the employer argued that the geographic scope should be restricted to the City of Cornwall where its existing plant was located whereas the union requested, and the Board accepted, that the geographic scope should be described as "in the united counties of Stormont, Dundas and Glengarry" to take account of the fact that the employer planned to move the existing plant some three miles away and outside of the municipal boundaries of Cornwall in approximately four weeks time. In these circumstances, the Board accepted that the bargaining unit should be expanded to embrace the planned move since to do otherwise would grant the applicant a certificate of very little value.

12. In the present case, however, the bargaining unit proposed by the applicant encompassed the location where work was anticipated to continue for some time and, as such, the concern of granting a certificate of little value was not an issue here. The situation in *Dynamic Closures Limited*, cited above, differed in that the smaller geographic scope sought by the responding party included only the facility that was anticipated to close - not the new facility. In the present case, what the employer requested was that the Board expand the usual scope of the bargaining unit to include a geographic area, the City of Brampton, where it was then anticipated that the employer would have no employees working after July 27, 2007. To do so, would therefore serve no ongoing labour relations purpose. It would also undermine the benefits associated with predictability in Board decision-making and the right of employees to select a bargaining agent of their choice in the event of a future expansion of the business in the City of Brampton.

13. The situation in the present case was also significantly different from that before the Board in *Hornco Plastics Inc.*, [1993] OLRB Rep. May 411 relied upon by the employer. In that case, the Board found that a broader unit encompassing two separate plants in the same regional municipality was appropriate for collective bargaining. The Board did so having regard to its finding that the two plants were comprehensively integrated and to the fact that there was a substantial amount of intermingling of employees through job postings and temporary transfers of

work and employees. In that case, work and employees had been temporarily transferred between plants about fifty times in the four year period prior to the certification application.

14. In this case, however, there was no evidence of any interchange of employees between the Vaughan and Brampton location in the period prior to the filing of the certification application. In addition, since the application was filed, only a handful of employees worked at both locations for a very short period before the Brampton location was anticipated to close altogether. In the circumstances, it could not similarly be said that a geographic scope which covered only the Vaughan location would create serious labour relations problems caused by the intermingling of employees. While the employer referred to the fact that it had a settled intention to intermingle the employees from the Brampton and Vaughan locations permanently, that intention was not to have two integrated facilities (as was the case in *Hornco Plastics Inc.*, cited above), but rather was to have a single integrated facility located within the geographic scope of the unit for which the union applied.

15. In the present case, the extent of interchange of employees between employer locations in different cities was limited to a very brief period of a month or two immediately *after* the filing of the certification application and was no more, if not less, than the degree of interchange in *CPI Plastics Group Ltd.*, [2000] OLRB Rep. March/April 163 (April 10, 2000) during the year *before* the application. In that latter case, the Board rejected the contention that it should depart from its normal practice of granting a certificate in accordance with a municipal designation having regard to its finding that the evidence before it showed very little actual interchange of employees. As a consequence, the Board did not accept that any labour relations problems would result from excluding from the scope of the bargaining unit the employer's operation in a different city. In the Board's view, the facts before it also did not suggest that any labour relations problems would result by limiting the scope of the unit to the city in which that single facility was located.

16. The alleged labour relations harm referred to by the employer in the present case related to the consequences of not allowing those Brampton Employees who were offered, and accepted, continued employment at the Vaughan location shortly after the date of application to have a say in the representation vote. This is not however the type of harm that has ever been recognized by the Board as one justifying a departure from the Board's normal practice in describing the geographic scope of a bargaining unit. It is a concern, which has been, and is, properly addressed by the Board under the build up doctrine. That issue will therefore be addressed below when dealing with the employer's alternative argument that the Board should either hold a second representation vote or count the ballots of those Brampton Employees who have since the date of application been hired to work at the employer's Vaughan location.

17. In all the circumstances of this case, the Board was not persuaded that it should depart from its normal practice of granting a certificate in accordance with a municipal designation.

Applicability of the Build Up Doctrine

18. The employer further argued that the Board should exercise its discretion under section 114(5) of the Act to order a second vote having regard to the principles of build up. The employer submitted that the Board ought to do so in order to allow the Brampton Employees to vote. Alternatively, the employer contended that the Board ought simply to count the ballots already cast by the Brampton Employees. The union took the position that the build up principle articulated in the Board's jurisprudence is simply not applicable on the facts in the present case.

19. The Board's practice of ordering a delayed vote where there is an anticipated "build up" of the employer's workforce reflects an effort to balance the rights of persons currently employed in the bargaining unit to bargain collectively as against the right of future employees to choose a bargaining agent. In *Samuel Manu-Tech Inc.*, [1994] O.L.R.D. No. 4342, the Board discussed its approach to build-up situations, as follows:

> 17. The Board's approach to the issues raised by the anticipated "build-up" of the workforce after the date on which the application for certification was filed has been succinctly summarized in *Kids Come First Child Care Centre of Vaughan and Canadian Union of Public Employees,* (decision dated September 20, 1994, Board File No. 1671-94-R) where the Board stated:
>
>> 20. The Board has exercised its discretion to order a representation vote where the employees employed in the bargaining unit on the application date do not constitute a substantial representative number of employees in the ultimate bargaining unit. The policy behind the exercise of this discretion is summarized in the case of *Northland Power Partnership,* [1991] OLRB Rep. June 768 at paragraph 8:
>>
>> The Board has recognized that there are circumstances in which it is appropriate to defer consideration of an application for certification. Where, for example, the Board is satisfied that an application is premature because a significant build-up of the workforce will take place within a reasonable period of time, the Board may defer consideration of the application, and order that a vote be taken at a time when a substantial representative number of employees are at work. This "build-up principle", as it [has) (sic) come to be known, represents an attempt to reconcile the right of present employees to exercise their rights under the *Labour Relations Act* and the right of future employees to do so (see for example, *R. ex rel. United Steelworkers of America et al v. Labour Relations Board (Saskatchewan)* and the *Random Mines Ltd.* [1970) (7d) L.R. 3rd 1, 69 CLLC para. 14,205 (SCC); *Champlain Forest Products Limited,* [1972] OLRB Rep. May 399; *Inco* [1973) OLRB Rep. March 172). This principle has been applied in limited circumstances (see, for example, *Emile Frant and Peter Waselovich* 57 CLLC para. 18,057; *F. Lenner* (sic) *& Son Ltd.* [1977] OLRB Rep. Dec. 846). More specifically, if the employees at work do not constitute a substantial and representative part of the workforce which is expected to be employed within a reasonable period, and the build-up does not depend on factors beyond the employer's control, the Board may defer consideration of an application for certification or order a deferred vote.

> 21. Over the years the Board has developed some guidelines to assist it in balancing the rights of the two groups of employees described above. First, the Board requires that there be a real likelihood that a build-up will take place. Second, the planned build-up must take place within a reasonable period of time. *Third, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If more than fifty per cent of the expected total are then employed, it is normally felt that the group is sufficiently representative and the Board will decline to exercise its discretion to order a representation vote. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and the Board exercises its discretion accordingly.* Fourth, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of application (*F. Lepper & Son Ltd.* [1977) OLRB Rep. Dec. 846 at paragraph 10; *Brick Brewing Co. Limited,* [1985) OLRB Rep. Nov. 1557 at paragraph 6; *Champlain Forest Products Limited,* [1972) OLRB Rep. May 399 at paragraphs 6 and 7; *GSW Inc.,* [1990) OLRB Rep. May 535 at paragraph 3; *Hawk Security Systems Limited,* [1993] OLRB Rep. August 751, paragraphs 19 and 22).
>
> (emphasis added)
>
> See also *Marley Roof Tiles Limited,* [1984) OLRB Rep. Mar. 511, *Domco Food Services Limited,* [1980) OLRB Rep. Feb. 158, *G.S.W. Inc.,* [1990) OLRB Rep. May 535, *N.S. Enterprises Limited,* unreported decision dated October 13, 1994, (Board File No. 1824-94-R).

In balancing the rights of current employees as against those of future employees, the Board will generally only exercise its discretion to direct the taking of a deferred representation vote where three criteria have been met. First, there must be a real likelihood that a build up will take place. Second, the build up must occur within a reasonable period of time. Third, the size of the build up must represent more than double the number of employees who were employed on the date of application.

20. While the requirement that the size of the build up represent more than double the number of employees who were employed on the date of application is a guideline only, there is nonetheless a relatively heavy onus on the party seeking to depart from it to establish why such a departure is necessary and appropriate. The Board in *Samuel Manu-Tech Inc.,* cited above, explained the rationale for the Board's approach as follows:

> 25. In balancing those interests the Board has over the years developed certain practices. One of those practices is the setting of a fifty per cent (50%) "build-up" threshold by reason of which the certification application will be deferred and a representation vote taken when the employees to be added to the unit during the build-up will exceed the number employed on the date of application was made. As is the case of many of the Board's practices the fifty per cent (50%) threshold is in the nature of a guideline and not a "carved in stone" rule. That guideline has now become well established within the labour relations

> community however so that there is a relatively heavy onus on a party which wants the Board to depart from that guideline to satisfy the Board that it is necessary and appropriate to do so. In this context, it must be noted that the trade union has met the statutory requirements for immediate certification having filed cards on behalf of more than fifty-five per cent of employees in the bargaining unit. It is the responding party and the intervenors who seek to change or defer the statutory consequences which would normally result from that fact. It must also be noted that since the *Labour Relations Act* was amended effective January 1, 1993 there is an increased emphasis on the date upon which the application was filed (i.e. the Board can no longer consider evidence of employee wishes filed or presented after the certification application date). For those reasons the onus on the responding party which seeks application of the extraordinary remedy flowing from the Board's application of "build up" principles is indeed heavy and necessitates exceptional and special circumstances.

In that case, the Board found that the responding party had not met its onus of establishing that there were any exceptional and special circumstances warranting a departure from the usual 50% guideline. The Board therefore rejected the contention that it should order a deferred vote having regard to the principle of build up.

21. As counsel for the employer acknowledged, the situation in the present case is very similar to that before the Board in *Samuel Manu-Tech Inc.*, cited above. Both cases involved a transfer of production and employees after the date of the certification application from one location that falls outside of the scope of the bargaining unit to a location that comes within the geographic scope of the unit. In *Samuel Manu-Tech Inc.*, cited above, the bargaining unit was anticipated to increase from 40 employees to 71 employees as a result of the proposed transfer of 31 employees from the responding party's Stoney Creek location to its Nanticoke location. The percentage increase of approximately 44% in the size of the bargaining unit was therefore less than the 50% threshold increase generally required to establish a relevant build up of the workforce. In the present case, 259 hourly rated employees were employed at the Vaughan location on the date of the application and 49 employees were working at the Brampton location. The anticipated build-up was therefore marginally less than 16%.

22. In both cases, the first two criteria for establishing build up were met. That is, in both cases, there was a real likelihood that a build-up would take place and the build up would also occur within a reasonable period of time. The reason the Board in *Samuel Manu-Tech Inc.*, cited above, rejected the application of the build up doctrine was because the third criterion relating to the size of the build up had not been met in that the anticipated increase in the bargaining unit in that case was 44% and therefore below the usual 50% threshold. The complement of existing employees was therefore found to be a sufficiently representative number. In the present case, the third criterion had also not been met and was, in fact, not even close to the usual 50% threshold given the anticipated increase in the bargaining unit of only approximately 16%.

23. While the employer argued that the present case is distinguishable in that the timeframe within which the transfer of employees will occur is less than was the case in *Samuel Manu-Tech Inc.*, cited above, the Board did not agree that that is a distinction that warrants a different result. As noted, the reason build up was found not to apply in that case had nothing to do with the timing of the anticipated transfer of employees, but rather related to the size of the

anticipated increase in the number of employees. In the circumstances, the Board could not agree that the anticipated timeframe in the present case warranted the application of the doctrine, particularly since the anticipated increase in the size of the bargaining unit in the present case was only 16% and therefore was significantly less than that in *Samuel Manu-Tech Inc.*, cited above, where the percentage increase was also the concern.

24. The Board in *Samuel Manu-Tech Inc.*, cited above, also rejected many of the same arguments made by the employer in the present case. For example, the Board in *Samuel Manu-Tech Inc.*, cited above, did not find the fact that the proposed transfer was well-known to the employees and the trade union at the time the certification application was filed to be a sufficiently compelling reason to depart from the 50% threshold. The Board in that case also rejected the responding party's argument that a departure was warranted given that the employees to be transferred into the bargaining unit after the application date were not new hires, but rather were existing employees of the responding party. At paragraph 27 of the decision, the Board noted that it can equally be said that it is unfair to have the rights of those individuals currently employed in the bargaining unit become dependent on the wishes of a smaller number of individuals who do not yet have a connection to the workplace at issue. The fact that the future employees are current employees of the responding party was insufficient to cause the Board to depart from its well-established practice, given that the 50% threshold was developed with a view to balancing the rights of existing bargaining unit employees as against that of future bargaining unit employees.

25. For the same reasons, the Board could not agree with the employer's submission that the facts in both *95467Ontario Ltd. (c.o.b. Pet Pak Containers)*, [1997] OLRB Rep. May/June 520 and in *996421 Ontario Inc. (c.o.b. Tim Hortons at Stores #630 and #1091)*, [1998] O.L.R.D. No. 1782 are distinguishable from those in the present case. In both of these cases, the Board rejected the application of the build up doctrine on the basis that the 50% threshold had not been met. In *95467Ontario Ltd. (c.o.b. Pet Pak Containers)*, cited above, the increase in the size of the bargaining unit was approximately 41% whereas in *996421 Ontario Inc. (c.o.b. Tim Hortons at Stores #630 and #1091)*, cited above, the increase was only 20%. The employer argued that those cases are distinguishable on the basis that the additional employees were new hires rather than employees hired by the employer prior to the filing of the certification application who were certain to be transferred into the bargaining unit as at the date of application. However, for the reasons articulated in *Samuel Manu-Tech Inc.*, cited above, we did not consider that to be a material distinction. The issue remains a question of balancing the rights of employees already working in the bargaining unit at the time the application was filed as against those who do not yet have a connection to the workplace falling within the scope of the unit.

26. The Board, in any event, also notes that in the present case the offer or transfer letters given to 47 of the 49 Brampton Employees were not made until after the certification application was filed. Contrary to the employer's suggestion, it was not therefore "certain" at the time the application was filed as to precisely which employees would take up employment falling within the scope of the unit.

27. The employer in the present case further argued that the fact that the union won the vote amongst existing employees by a "razor's edge" represents an exceptional circumstance warranting a departure from the usual threshold requirement. This suggestion however misconstrues or distorts the principle of build up. The test has never been, nor should it be,

whether the result of the application would be the same if the wishes of the new hires were considered. If that were the test, the Board would be called upon to speculate about the wishes of new hires and/or would defer applications where only a handful of new hires were anticipated in situations where the result of the application amongst existing employees is close. The Board would also have to resolve all relevant status disputes before being able to consider whether a deferred vote should be ordered.

28. The relevant question is instead whether the existing workforce is sufficiently representative. If so, the result of the application will be governed by the wishes of the existing employees as at the date of the application. As noted in *95467Ontario Ltd. (c.o.b. Pet Pak Containers)*, cited above, at paragraph 14, "...the core requirement is to determine what constitutes a sufficiently representative proportion of the eventual staff complement in the bargaining unit."

29. The Board does not refuse to certify a trade union simply because the results of a representation vote are close, nor should it for this reason drop the threshold required to bring the application of the build up principle to bear so substantially. Whether the Board might ever be prepared to relax the 50% threshold in circumstances where support for the union is closely split is not an issue that needs to be decided here. In the circumstances of this case, the Board is not prepared to do so given that the anticipated increase in the total workforce falls so far short of that usual threshold. In the present case, the Board has no difficulty finding that the number of employees employed in the bargaining unit on the date of application was a sufficiently representative number of employees in the ultimate bargaining unit such that it was not appropriate to apply the build up doctrine. The result of the representation vote taken amongst those eligible to vote as at the date of application should therefore govern.

30. The present case is further distinguishable from that in *Grand Bay Hotel (c.o.b. Park Plaza Hospitality L.P.)*, [1998] OLRB Rep. September/October 863 referred to by the employer. In that case, the Board accepted that the build up doctrine applied such that a deferred vote should take place at such time as more than fifty per cent of the anticipated complement had been hired. In that case, unlike the present one, all three of the usual criteria for the application of the doctrine had been satisfied, including the 50% threshold requirement. The Board found in the circumstances of that case that it was a relative certainty that the existing complement of two bargaining unit employees would increase to five or six, representing an anticipated increase of between sixty and sixty-six percent. Although a representation vote had been taken in that case amongst existing employees, the Board took no account of the results of the vote in assessing the application of the doctrine of build up and deciding whether to declare that vote a nullity in order to allow the anticipated new hires to participate. The Board's determination in that regard is properly based on whether the existing complement of employees was a sufficiently representative proportion of the eventual staff complement in the bargaining unit such that their wishes should govern.

Disposition

31. For all these reasons, the Board gave effect to the representation vote and certified the applicant.

32. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

2312-07-HS; 2313-07-HS Central North Correctional Centre, Applicant v. Ontario Public Service Employees' Union and Inspector Joe Zaher, Responding Parties

Health and Safety – Interim Relief – The employer sought an appeal and suspension of an Order made by an Inspector – At issue were what measures are necessary to protect the health and safety of nurses required to enter areas that are undergoing a "level 2 or higher" search for weapons in a correctional centre – The Board invoked its interim relief powers under the OHSA: (1) relieving the employer of its obligation to purchase custom-made vests for the Nurses; (2) instead, requiring the employer to provide Nurses who deliver medication in cells during searches with a vest that fits reasonably well; and (3) ordering the employer to continue the "delivery of essential medications during searches in cellular accommodation areas" in accordance with its own memorandum – In light of the interim order, the suspension was granted – Appeal continues

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

DECISION OF THE BOARD; November 7, 2007

1. This is an application under section 61(7) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the "Act") seeking the suspension of Order No. 1 issued by Inspector Zaher in Field Visit No. 5345096 on September 20, 2007. The application to suspend Order No. 1 has been assigned Board File No. 2313-07-HS. The applicant has also filed an appeal of Order No. 1 which has been assigned Board File No. 2312-07-HS. This decision deals only with the suspension request.

2. The Inspector did not file a response to the applicant employer's request to suspend the Order. OPSEU opposes the suspension.

3. Both workplace parties agreed that the issue before the Board has a history to it. At the centre of it is a dispute about what measures are necessary to protect the health and safety of Nurses required to enter areas that are undergoing a level 2 or above search for weapons. All parties agree that while such searches are going on, Nurses are required to enter as yet unsearched areas to administer necessary medications to inmates. All parties agree that the Nurses are accompanied by Correctional Officers who are required to wear body armour whenever they enter areas where a level 2 or above search for weapons is occurring.

4. As the workplace parties set out in their pleadings, various measures have been taken to try to address the issue, none of which are totally satisfactory to all. However, the parties' careful detailing of the history has provided the Board with enough information to make an interim order pursuant to section 61(3.4) of the Act which I believe will adequately protect the health and safety of the Nurses until such time as the Board can hear the employer's appeal on the

merits. At the same time, the Board's interim order relieves the employer of the obligation to purchase custom-made vests for the Nurses, its principal concern, until its appeal is determined.

5. As an interim order, the employer will continue to implement its September 10, 2007 memorandum entitled "delivery of essential medications during searches in cellular accommodation areas", which, essentially, places the Correctional Officer who accompanies the Nurse, between the Nurse and the inmate for most of the time that the medication is being administered. In addition, the employer will make available to all Nurses required to deliver essential medications during searches in cellular accommodation areas with a vest that fits reasonably well, but it need not be a custom-made vest.

6. Because of my interim order, I am prepared to suspend Order 1 issued by Inspector Zaher in Field Visit No. 5345096 on September 20, 2007 until this appeal is determined.

7. I am not seized of the appeal, but if there are difficulties in the implementation of my interim order, I direct the Registrar to place the file before me if convenient.

DISPOSITION

8. The application for a suspension of Order No. 1, Board File No. 2312-07-HS, being the appeal on the merits of this application, is to be forwarded to the Registrar.

1215-06-R; 1272-06-U Labourers International Union of North America, Local 1059 v. **Double H Concrete Forming**, Responding Party; Labourers International Union of North America, Local 1059 v. Double H Concrete Forming and Denis Hebert, Responding Parties

Certification – Construction Industry – Representation Vote – Unfair Labour Practice – Remedies – The union filed an application for card-based certification as well as an unfair labour practice complaint alleging violations of ss. 70, 72 and 76 of the Act – Because the Board had earlier determined that 40 to 55 percent of the employees in the bargaining unit were members of the union on the date that the application for certification was filed, the Board directed that a representation vote be held and counted forthwith (The union had asked the vote to be deferred until after the ULP was determined) – The Board held that if the union does not obtain 50 percent of the votes cast in the representation vote, s. 11(2) of the Act is still applicable and the unfair labour practice complaint will be heard – Matter continues

BEFORE: *Susan Serena*, Vice-Chair.

APPEARANCES: *Stephen Krashinsky, Mario Cordeiro* and *Philip DaSilva* appeared on behalf of the applicant; *Elizabeth Traynor, Denis Hebert, Dawn Hebert* appeared on behalf of the responding party.

DECISION OF THE BOARD; November 1, 2007

1. This is an application for certification filed on July 17, 2006 under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to proceed pursuant to section 128.1 of the Act. Board File No. 1272-06-U is an unfair labour practice complaint in which the applicant alleges the responding party violated sections 70, 72 and 76 of the Act. The applicant also seeks relief under section 11 of the Act.

2. After a lengthy hearing to deal with the outstanding status disputes in the application for certification, the Board determined that at least 40 percent but not more than 55 percent of the employees in the bargaining unit were members of the union on the date the application was filed. In these circumstances, subsection 128.1(12) of the Act directs the Board to conduct a representation vote.

3. The responding party maintains the Board should hold the representation vote without further delay. It maintains it will suffer prejudice if the vote is delayed any longer because its workforce is transient. Finally, the responding party contends section 11 does not apply in the circumstances of this case because the Board has determined the union demonstrated it had the support of at least 40 per cent of the employees in the bargaining unit proposed by the applicant. As a result, the responding party submits the union should have filed its application for certification under section 8 of the Act in which case a representation vote would have been held in July 2006.

4. The applicant asserts the representation vote should be delayed until after the Board has dealt with the union's unfair labour practice complaint because the Board could certify the union without a vote or grant relief to the union that could affect the outcome of the representation vote. Further, it maintains the result of the vote could undermine the union's support.

5. Traditionally, the Board has allowed the applicant to make the election to defer the representation vote until after the unfair labour practice complaint has been resolved. In this case the union prefers that option because it wishes the opportunity to obtain the relief it seeks in that application, including possible relief under section 11 of the Act.

6. Section 11 of the Act provides as follows:

> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.
>
> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,

> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
>
> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or
>
> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.

7. In this application for certification the union elected to proceed under section 128.1 of the Act.

8. In *Southside Construction (London) Limited,* [2005] OLRB Rep. Sept./Oct. 854 (October 17, 2005) the Board determined that relief under section 11 is not available where the union elects to proceed under section 128.1 of the Act unless the Board is required to direct a representation vote pursuant to subsections 128.1(12) and (14) of the Act.

9. Subsections 128.1(12) and (14) of the Act reads as follows:

> (12) If the Board is satisfied that at least 40 per cent but not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it shall direct that a representation vote be taken.
>
> ...
>
> (14) If the Board directs that a representation vote be taken,
>
> (a) the vote shall, unless the Board directs otherwise, be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the direction for a representation vote is made;
>
> (b) the vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made;
>
> (c) the Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs;
>
> (d) subject to section 11.1, the Board shall certify the trade union as bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union; and

> (e) subject to section 11, the Board shall not certify the trade union as bargaining agent of the employees in the bargaining unit and shall dismiss the application for certification if 50 per cent or fewer of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

10. The relief the union seeks under subsection 11(2)(c) is only available in the two circumstances described in subsections 11(1)(a) and (b) of the Act. The Board's determination that the union demonstrated it had the support of at least 40 per cent of the individuals in the bargaining union on the application date clearly precludes any possible application of subsection 11(1)(b) of the Act to this application for certification.

11. The only route left for the union to obtain relief under section 11 of the Act is through subsection 11(1)(a) which can only apply after the Board has conducted a representation vote under subsection 128.1(12) of the Act. If the union fails to receive more than 50 percent of the votes cast, subsection 128.1(14) (e) of the Act, which is subject to section 11 of the Act, applies.

12. If the union was only seeking to obtain relief under section 96 of the Act then it might be appropriate for the Board to delay the vote until after the unfair labour practice complaint has been determined.

13. However, in this case the union is maintaining its claim for relief under section 11 of the Act. Therefore the Board must proceed as directed by subsections 128.1(12) and 128.1(14) of the Act. Accordingly, the representation vote will be held forthwith and the ballots will be counted as contemplated by subsection 128.1(14)(e) of the Act.

14. The applicant has filed membership evidence on behalf of more than 40 per cent but not more than 55 per cent of employees in the bargaining unit. Therefore, pursuant to subsection 128.1(12) of the Act, the Board directs that a representation vote be taken of employees employed in the following bargaining unit:

> all construction labourers in the employ of Double H Concrete Forming Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers employed in all other sectors of the
>
> construction industry excluding the industrial, commercial and institutional sector thereof in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.

15. The employees eligible to vote are as follows:

1. Eric Ashelby
2. Ryan Baer
3. Jarret Crosby
4. Justin Crosby

5. Shawn Cruickshank
6. Phil Hartford
7. Jamie Nelson
8. Mike Nelson
9. Josh Nicholson

16. In the circumstances, the Board directs the parties to forthwith contact the Manager of Field Services regarding this application and to return a completed Vote Arrangements in the Construction Industry (applications under section 128.1) attached as a Schedule to this decision directly to the Vote Coordinator **within two (2) days** of receiving this decision.

17. The responding party is directed to post copies of the application for certification, the "Notice to Employees of Application for Certification", this decision and the "Notice of Vote" in a location or locations where they are most likely to come to the attention of those individuals who are eligible to vote.

18. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

19. This matter is referred to the Registrar.

Vote Arrangements in the Construction Industry (applications made under section 128.1)

This sheet is to be completed by each party and returned by fax (416-326-6299) to the attention of the Vote Coordinator or e-mailed to votecoordinator@mol.gov.on.ca, within 2 days of the date of the Board's decision ordering a vote. Please copy the other parties with your completed copy of this form. The Vote Coordinator will review the arrangements proposed by the parties, and will in the normal course set the vote arrangements without further consultation with the parties.

File # :

Name of Party:

Name of Person completing this vote arrangement sheet:

Telephone # where you can be contacted:

Vote Arrangements (Please read Information Bulletin No. 8 -- Vote Arrangements in the Construction Industry before completing this portion of the form.)

1. Do you assert that a vote should take place on the fifth day after the date of the Board's decision ordering a vote?

[ ] Yes
[ ] No

If the answer is no, please explain fully. As well, please state the date on which you believe the vote should take place, and explain why:

2. Please list the regular days and hours of work of the employees in the proposed bargaining unit:

Do the employees in the proposed bargaining unit meet together at one location at any point in the day? If so, where and when.

Please list below your proposed hours for the vote specifying start and finish times and either a.m. or p.m.

Please explain the reasons for your proposed vote times:

3. Please indicate below your proposed location of the poll(s) (e.g. employer premises, job sites(s), other locations):

If proposing that the vote be held on job sites, please give the name and cell phone number of the representative who will be at that site:

Poll #1

Description of the location (in detail):

Poll #2 (only if multiple locations are necessary)

Description of the location (in detail):

Please explain the reason for your proposed location for the poll(s):

4. If you are requesting special voting arrangements or methods that depart from the Board's normal practices that are described in Information Bulletin No. 8, please specify those arrangements and the reasons for them (in detail):

5. Please indicate the number of Notices of Vote that you believe should be posted so that they will come to the attention of all the employees affected by the application, or indicate any suggested alternative methods of notifying employees of the vote:

6. Please state the name of the Scrutineer(s) you have selected to represent you at each poll:

Poll #1:

Poll #2: (only if multiple locations are necessary)

7. Please state the name of the agent you have selected to represent you at the counting of the ballots:

8. Please indicate the name of the applicant as you wish it to appear on the Notice in the voting booth (and, in a displacement application, on the ballot):

date	signature

1966-07-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Hillside Sod Ltd.**, Responding Party

Certification – Construction Industry – Practice and Procedure – Representation Vote – Unfair Labour Practice – LIUNA filed membership evidence in excess of 55% in support of this card-based application for certification – The responding party alleged that the union had acted improperly in its collection of membership evidence by assuring the employees they were only signing cards to get a vote and by advising the employees that the employer was supportive of the union – Further, a number of employees wrote to the Board stating that they did not wish to belong to the union, and requesting a representation vote – The Board ruled that the fact an employee signed a membership card but later had a change of heart would be irrelevant to the exercise of its discretion in certifying the union – The Board was concerned, however, about the employer's allegations and considered its options: to certify the union, to order a vote, or to dismiss the application – The Board determined that it should set the matter down for hearing to hear evidence about the allegations attributed to the union's organizers - Matter listed for hearing

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; November 28, 2007

1. In this application for certification under the construction industry provisions of the *Labour Relations Act, 1995*, c. 1, as am. (the "Act") , the Board, by decision dated October 4, 2007, determined the description of the appropriate bargaining unit and noted that the applicant had filed membership evidence on behalf of more than 55 per cent of the employees in the bargaining unit who were at work on the application date. The Board stated that the applicant would "normally be entitled to be certified under section 128.1." Nevertheless, as a result of a number of allegations made by the responding party in connection with the collection of the membership evidence relied on by the applicant, the Board referred this application to a Regional Certification Meeting.

2. The applicant, the responding party and a group of employees have filed submissions following that meeting. The responding party submitted its correct name is Hillside Sod Ltd. The parties agree that the correct name of the responding party is Hillside Sod Ltd. and therefore the Board amends the name of the responding party accordingly.

3. The responding party has withdrawn its submissions with respect to Joe Amato Jr. Therefore, the challenge made by the applicant with respect to his status is maintained and Mr. Amato Jr. is not an employee in the bargaining unit. The responding party also accepts that it was engaged in work in the construction industry on the application date.

4. The responding party in its response and in its submissions following the Regional Certification Meeting continues to assert that the applicant had engaged in misconduct and misrepresentations when securing the membership evidence it filed in support of this application. The responding party asserts that Steve D'Arpino, an organizer of the applicant, told employees that by signing a card, the employees would be entitled to vote on whether applicant represents them. It also alleges that another of the applicant's organizers, Vakkas Demiroglu, told the

responding party's employees that the responding party supported the applicant and that they should therefore sign membership cards.

5. The Board, on November 22, 2007, also received a letter dated November 17, 2007 from an individual whose name appears on the list of employees filed by the responding party that was mailed by Registered Mail on November 21st. That individual, together with five other persons, all of whom are on the list of employees filed by the responding party signed that letter.

6. The letter states:

> WE, [names omitted], request to right to vote.
>
> We do not wish to be part of Local 183 Union. We represent the majority of the employees of Hillside Sod Limited.
>
> We have had the opportunity to speak with [names omitted]. These two individuals wish to be part of the Local 183 Union. It should be noted that neither person has any long term plan to remain with Hillside Sod Limited. Both intend to work in the high-rise industry. [Name omitted], is intent on obtaining his DZ drivers' licence and was promised by union representatives that they would pay for his training.
>
> Furthermore, it should be noted that both [names omitted] are not company men. They average approximately 25 to 30 hours per week on a 50 to 60 hour work week, which makes the work week more difficult for the rest of us.
>
> As you can appreciate, in our field, we are limited by only being able to work half a season, to have two employees with no appreciation and a lack of regard in this matter is to say the lest, ludicrous.
>
> WE, the undersigned, stand together and demand our right to vote.

It is clear that the individuals who signed the letter do not want "to be a part of" the applicant. If those persons had applied for membership in the applicant by signing membership cards, and subsequently changed their minds about being represented by the applicant, their change of mind would be irrelevant to whether the Board would exercise its discretion under section 128.1(13)(a) of the Act and certify the applicant without conducting a representation vote. See *Highview Plumbing & Heating Ltd.*, decision dated August 12, 2005, unreported, Board File No. 0990-05-R, Q.L. cite [2005] OLRD No. 3313, *Holman's Welding Limited,* [2005] OLRB Rep. July/August 621 (July 6, 2005).

7. The Board is required by section 128.1(4) to determine as of the application date, the appropriate bargaining unit, and the percentage of employees in that bargaining unit who are members of the applicant trade union. Section 128.1(4) provides:

> 128.1(4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the

> basis of the information provided in or with the application and under subsection (3),
>
> (a) the bargaining unit; and
>
> (b) the percentage of employees in the bargaining unit who are members of the trade union.

Thus, individuals who were members of the union (including persons who have applied for membership) as of the date of application may certainly change their mind about union representation, but doing so does not affect the level of membership in the union at the time the application was filed, which is the determination the Act requires the Board to make. The Board explained that proposition this way at paragraphs 9 and 10 of *Highview Plumbing & Heating Ltd.*:

> 9. Section 128.1(4) requires the Board to determine, as of the application date, the percentage of the employees in the bargaining unit who are members of the applicant. It is the employees' status as union members on the application date that is relevant to the Board's determination under section 128.1(4), not whether individuals who were union members on that date subsequently had second thoughts about joining the union. See *Holman's Welding Limited*, as yet unreported, Board File No. 0897-05-R, decision dated July 6, 2005.
>
> 10. The Board's determination under subsections 128.1(7), (12) or (13) of the Act is based on the percentage of employees who were union members on the application date. Although the Board has a discretion to order a representation vote under section 128.1(13)(b) even where more than 55% of the employees are union members, given that the Act permits a union to be certified if more than 55% of the employees in the bargaining unit were members as of the application date, the mere fact that some of those members may have changed their mind after the application date is, in our view, irrelevant to the Board's exercise of its discretion under section 128.1(13)(b). Whether the Board directs a representation vote despite an applicant demonstrating that more than 55% of the employees in the bargaining unit are union members must, in our view, be based on factors other than the degree of support for or opposition to the applicant union at a time subsequent to the date of application.

If the only allegation before us was the letter from the employees asking for a vote because they had changed their minds about union representation, we would have considered the request irrelevant and exercised our discretion under section 128.1(13)(a) and certified the applicant. Nevertheless, in view of the letter from the employees seeking a representation vote and the allegations made by the responding party about the collection of membership evidence by the applicant, those allegations, if proved, would be relevant in deciding whether to direct a representation vote.

8. Section 128.1(5) of the Act provides:

> Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the Board

> considers it appropriate to consider the evidence and submissions in making a decision under this section.

The allegations raised by the responding party can be considered by virtue of section 128.1(5) of the Act. The responding party alleges misrepresentation, asserting that employees were told they would get a chance to vote if they signed a card for the applicant, and that they should sign a card because their employer was in favour of the union. While the latter allegation raises a suggestion of intimidation, the former allegation relates directly to the Board's exercise of discretion under section 128.1(13). See *Carleton University,* [1975] OLRB Rep. April 308; *Gruyich Services Inc.*, [1986] OLRB Rep. July 1092. Under these circumstances, the Board is not prepared to disregard the allegations made by the responding party (to which the applicant has not replied) and the request for a vote filed by six employees.

9. The responding party by letter dated November 27, 2007 provided the Board with a copy of the employees' letter set out in paragraph 6 above. The responding party submits the letter is further evidence of "the applicant's taint of the certification process". The responding party goes on to submit that the Board should dismiss this application or alternatively, direct a representation vote. The Board is not prepared at this stage of the proceeding to do either.

10. The Board refers this matter to the Registrar for two days of hearing to hear the evidence and representations of the parties with respect to the allegations made by the responding party relating to the collection of membership evidence. For purposes of clarity, the issue before the Board is NOT whether the employees in the bargaining unit wish or do not wish to be represented in collective bargaining by the applicant. Rather, the issues are whether the alleged statements attributed to the applicant's organizers were made to the employees in the bargaining unit to induce them to sign applications for membership in the applicant, and if so, whether such statements warrant the Board exercising its discretion under section 128.1(13)(b) of the Act to order a representation vote when the applicant had filed membership evidence that establishes more than 55 percent of the employees in the bargaining unit were members of the applicant on the application date.

11. This panel of the Board is not seized with this matter.

12. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit and to ensure that these copies remain posted for a period of 30 days.

1966-07-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Hillside Sod Ltd.**, Responding Party

Certification – Construction Industry – Practice and Procedure – Where the responding party makes specific allegations about improper statements having been made by the applicant's representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; December 5, 2007

1. The Board by decision dated November 28, 2007 in this application for certification under the construction industry provisions of the *Labour Relations Act, 1995*, c. 1, as am. (the "Act"), referred this matter to the Registrar to be listed for hearing to deal with the allegations made by the responding party relating to the collection of the membership evidence filed with the Board.

2. The Registrar fixed December 6 and 11, 2007 for the hearing. At the request of counsel for the responding party and with the consent of the applicant, the December 6th hearing was adjourned but the hearing scheduled for December 11, 2007 is to proceed.

3. Counsel for the applicant, by letter dated December 4, 2007 seeks to have the Board direct the responding party provide particulars of the allegations in accordance with Rule 5.1 of the Board's Rules of Procedure. He refers to a letter he sent to counsel for the responding party on December 3rd, and advises that counsel responded promptly to the request advising that he was not able to provide the particulars requested. Counsel for the applicant seeks an order from the Board directing the responding party to provide particulars.

4. Rule 5.1 of the Board's Rules provides:

> Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

There are two principles set out in Rule 5.1: a) allegations of improper conduct must be made promptly after a party becomes aware of the conduct, and b) the allegations must provide sufficient information to the party or person alleged to have engaged in the improper conduct so that he, she or it will know what has been allegedly done that is considered improper. It is the latter principle of Rule 5.1 that appears to concern the applicant.

5. Counsel for the applicant in his December 4th letter states that he had "sought only the information required by Rule 5.1 of the Board's Rules of Procedure…." The letter then sets out the specific request:

> We require particulars of your client's allegations immediately. To whom were the statements attributed to Steve D'Arpino and Vakkas Demiroglu made? When were they made? Where were they made?

In order for the applicant to prepare its defense to the allegations it must know, at the very least, the date, time and location of the alleged statements. The applicant had already been advised by the responding party's allegations who is alleged to have made those statements. In *Pebra Peterborough Inc.*, [1987] OLRB Rep. 421 the Board commented on what is necessary to meet the minimum requirements of particulars when it wrote at page 422:

> …a party against whom the allegations of wrongdoing are made must have sufficient notice of them to enable it to know and prepare for the case it must meet….
>
> In considering the sufficiency of the allegations, the Board considers whether or not they substantially identify the offences alleged and the acts or omissions complained of; whether the information requested is really required by the party requesting it; the knowledge or availability of knowledge possessed by the parties of the alleged improprieties, whether what is being requested is really evidence rather than particulars (though particulars may reveal evidence or names of witnesses); the apparent purpose for the demand for particulars; and, the general nature and circumstances of the improprieties alleged.

See also *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141.

6. Counsel for the responding party, by letter dated December 4th, in reply to the applicant's request submits it cannot provide the information sought. He contends that:

> …providing the particulars requested would require our client to directly engage the employees in the proposed bargaining unit in a discussion surrounding the certification application and the misconduct of the Applicant's Organizers. Our client has approached this situation with the utmost caution and wishes to avoid even the appearance – no matter how inaccurate – of inappropriate interference. Our client…is doing its utmost to prevent any allegations from the Applicant that the Responding Party has unduly interfered with the certification process.

7. While an employer has a legitimate concern should it discuss the organizing efforts of a trade union with its employees (see for example, *Elgin Construction Company Ltd.*, [1987] OLRB Rep. 45), in this case the responding party has made specific allegations about statements having been made by the applicant's representatives during the collection of membership evidence. The responding party must have received that information from somewhere and thought it reliable enough to file charges against the applicant relating to the membership evidence that was collected. The responding party has made allegations it will have to prove by calling evidence at a hearing before the Board.

8. Counsel for the responding party suggests that the applicant could request the Board to appoint a Labour Relations Officer to make inquiries of the employees to obtain particulars and provide the parties with the information obtained.

9. It is not the Board's role to undertake investigations of allegations made by a party. It is up to the responding party to prepare its case, bearing in mind the limitations the Act imposes on employers when dealing with employees when a union is seeking certification. It appears that counsel recognizes that there is some scope for the responding party to make the necessary inquiries since he indicates his client's concerns about "inappropriate interference" and being accused of having "unduly interfered with the certification process."

10. If the responding party wishes to continue with its allegations, it must decide how to best proceed to prepare the evidence necessary to prove those allegations. The fact that the

allegations relate to the collection of membership evidence from employees does not insulate the responding party from its obligation to provide particulars of its allegations so that the applicant can know the case against it.

11. In my view, Rule 5.1 of the Board's Rules requires that the applicant be advised of the dates, places and times the alleged statements were made. The disclosure of the names of the people to whom the alleged statements were made is not necessary for the applicant to prepare its case. Once the applicant knows the circumstances surrounding the making of the alleged statements, the applicant can review the matter with the two persons named by the responding party. Providing the names of the people to whom the alleged statements were made is not required by Rule 5.1 (it only requires "the names of any persons said to have acted improperly") and therefore will not be ordered disclosed.

12. The hearing of this matter is now scheduled for December 11, 2007. In order to allow the applicant sufficient time to prepare for the hearing, the Board directs the responding party to provide to the applicant the dates, places and times the statements in issue were allegedly made by Messrs. D'Arpino and Demiroglu not later than 4:00 p.m. Friday December 7, 2007. If the responding party fails or refuses to provide those particulars by that time, the applicant may, if so advised, raise the matter with the panel assigned to the hearing on Tuesday December 11th.

13. This panel of the Board is not seized with this matter.

2127-05-G; 3437-05-G International Brotherhood of Electrical Workers, Local 353, Applicant v. **Jacobs Catalytic Industrial Services Limited**, Responding Party v. General Presidents' Maintenance Committee for Canada and The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Intervenors; International Brotherhood of Electrical Workers, Local 353, Applicant v. Jacobs Catalytic Industrial Services Limited, Responding Party

Construction Industry Grievance – Estoppel – The union filed two grievances alleging that Jacobs had performed work incorrectly under the General Presidents' Maintenance Agreement rather than under the provincial ICI agreement for construction, and its members were thereby deprived of higher wage rates – Jacobs argued that the work was properly characterized as maintenance or, in the alternative, the union should be estopped from its claim for relief, or the relief should be significantly reduced because of the late filing of the grievances – A majority of the Board found that work performed on existing equipment and machinery, including replacement of individual items, was maintenance – The changes undertaken by Jacobs did not involve enhancements or additions to a production process; there was no replacement of an entire system, and the change was not designed to increase production – On the other hand, the erection of a new blast-proof shelter and the installation of related cabling for the burner management system was construction; similarly the electrical work around the chloride mitigation tower, as well as the work associated with its new exchangers, was construction – Examining the employer's estoppel argument, the Board held that there is a distinction between an estoppel against the application of a provincial agreement and the estoppel against the application of a public statute: in specific circumstances, based on equity, it might be

unconscionable for a particular beneficiary of rights under a provincial agreement to enforce those rights – In this case, the work contemplated by Petro-Canada and Jacobs was maintenance, the various trades were consulted and agreement was reached, and the work was performed without complaint by other than the applicant – The Board found that the union's representative had agreed that the projects would be conducted as maintenance, and that Jacobs had relied on this representation to its detriment –The estoppel argument succeeded - Grievances dismissed

BEFORE: *Christopher J. Albertyn*, Vice-Chair, and Board Members *John Tomlinson* and *Alan Haward*.

APPEARANCES: *A. M. Minsky, Cameron Commandant* and *Jeff Conway* for the applicant; *Roy Filion, Laura Karabulut, Gord Duggan* and *George Scott* for the responding party; *Donald K. Eady* and *Steve Smillie* for General Presidents' Maintenance Committee for Canada; *Daniel B. Fogel* and *Eryl Roberts* for The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario.

DECISION THE BOARD (WITH PARTIAL DISSENT BY BOARD MEMBER ALAN HAWARD); November 29, 2007

The Grievances

1. The style of cause is amended to reflect the responding party as "Jacobs Catalytic Industrial Services Limited".

2. This matter concerns two grievances filed by the IBEW, Local 353 ("the Union") filed with the Board under s. 133 of the *Labour Relations Act, 1995* ("the Act"). Each alleges that a project performed by Jacobs Industrial Services Limited ("Jacobs Catalytic", "the Employer", "the Company") on the Petro-Canada oil refinery site in Mississauga was wrongly done under the General Presidents' Maintenance Agreement ("the GPMA") rather than under the provincial ICI agreement for the electrical industry ("the Principal Agreement", "the ICI agreement"). The Union claims the work on two projects, the BMS/ESD and CMP, was ICI construction work, not maintenance. As a consequence, says the Union, the employees who worked on the projects were underpaid because they ought to have received the rates payable under the Principal Agreement, and not those payable under the GPMA.

3. Jacobs Catalytic is bound by the GPMA and by the ICI agreement.

4. The key differences between the GPMA and the ICI agreement is that work under the GPMA is paid at $1 an hour less than under the ICI agreement and the ICI agreement has shorter hours of work each week (37.5 hours) than the GPMA (40 hours) with the result that some regular work under the GPMA (2.5 hours) would be overtime under the ICI agreement. The less favourable conditions of the GPMA are made up, often, by the stability and durability of the work under the GPMA.

5. The parties agree that if damages are due to the Union, the quantum will be determined subsequently. This decision deals only with the question of liability.

6. Jacobs Catalytic denies the grievances. It says the work was maintenance, properly performed under the GPMA. In the alternative, it says the Union is estopped from claiming any relief under the ICI agreement. In the further alternative, Jacobs Catalytic contends, if any relief is due to the Union, it is significantly reduced by the late filing of the grievances by the Union.

7. The Electrical Contractors Association of Ontario ("the ECAO") is allied in interest with the Union. The General Presidents' Maintenance Committee for Canada ("the GPMC") is allied in interest with Jacobs Catalytic. The GPMC contends that we ought to defer consideration of this matter for its decision under the GPMA.

8. The history, purpose and content of the GPMA was well described by the Board in *Delta Catalytic Industrial Services Ltd.*, [1997] OLRB Rep. Nov. 979 (referred to herein as *Delta Catalytic 1*). We adopt the comments made in that decision regarding the history, purpose and content of the GPMA. The decision also aptly describes the role and purpose of the GPMC. The GPMA is renewed periodically by agreement of the participating trades.

9. The GPMC meets with the various local unions before it renews the GPMA. At such a meeting on March 3, 2005, prior to the renewal of the GPMA in 2005, a representative of the Union was present with those from the local unions in Toronto.

10. Jacobs Catalytic (now known as Jacobs Industrial Services Limited), or one of its predecessors (first Catalytic Enterprises, then Catalytic Maintenance, then Stearns Catalytic, then Delta Catalytic, then Jacobs Catalytic) has been in the business of maintenance contracting since prior to 1951. It is a global corporation with over 45,000 employees worldwide, with its head office in Pasadena, California. It has been on Petro-Canada's Mississauga refinery site since the 1970s. It will perform new construction only when specifically solicited to do so by a client; its usual business is plant maintenance.

11. The work done by Jacobs Catalytic was on two projects – hence the two grievances – the white oils heater or burner management system upgrade and emergency shutdown system project ("the BMS/ESD"), and the chloride mitigation project ("the CMP"). The BMS/ESD project was sometimes referred to as the white oils project, although strictly speaking both projects – the BMS/ESD and the CMP – were done on Petro-Canada's white oils unit.

12. The Union's first grievance, for the BMS/ESD project, was delivered to Jacobs Catalytic on September 1, 2005. It was referred to the Board for determination on October 31, 2005. Its second grievance, for the CMP, was delivered to Jacobs Catalytic on November 4, 2005 and referred to the Board on January 16, 2006. These grievances were filed well outside of the 5-day time period stipulated in the Principal Agreement for the filing of grievances. The Union asks that we exercise our discretion to extend the time period for the filing of the grievances under s. 48(16) of the Act. In any event, the Union contends the grievances concern an ongoing liability, so, at least, the Union's claim runs forwards from the date the grievances were respectively filed.

13. We deal with the various issues in the following order. We deal first with the request by GPMC that we defer consideration of these grievances and that the GPMC be allowed to determine the Union's contentions regarding the nature of the work done on the two projects, under the provisions of the GPMA. We then consider the nature of the work and we make our determination as to whether the work on the two projects was maintenance or construction. We

then consider the Company's estoppel argument. Finally we deal with the Union's request to extend the time for the filing of the grievances.

Referral of the Union's grievances to the GPMC and the GPMA provisions

14. The GPMC contends that the grievances ought to have been referred to it under Article 6.800 of the GPMA, rather than be determined by the Board. That provision reads as follows:

> The administration and interpretation of this Article is the responsibility and prerogative of the GPMC for Contract Maintenance in Canada.

In the definitions provision of the GPMA, at Articles 6.100 and 6.200, "maintenance" is defined. Article 6.100 reads as follows:

> Maintenance shall be work performed for the repair, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property.

15. The other relevant provisions of the GPMA read as follows. Article 6.200:

> All work performed by the Company on existing equipment and machinery, including associated work in a given plant, shall be maintenance. This shall include replacement of existing individual items of machinery and equipment with new units, including all associated work, as well as maintaining the facilities to accommodate environmental regulations as required by law. It is understood that this concept would not include replacement of an entire process system installation in a plant in order to increase production.
>
> Article 6.500:
> The word "repair" used within the terms of this Agreement and in connection with maintenance, is work requested to restore by replacement or by revamp of parts of existing facilities to efficient and operating conditions.
>
> Article 6:600:
> The word "renovation" used within the terms of this Agreement and in connection with maintenance, is work required to change by replacement or by "revamp" of parts of existing facilities to efficient operating conditions.

16. The GPMC contends that the Board should defer the determination of whether the work is construction or maintenance to the GPMC. It argues that the longstanding practice of the parties, both signatories to the GPMA, has been to refer such disputes to the GPMC for determination.

17. The Union and the ECAO both contend that the Board is the proper forum for the determination of whether the work performed was maintenance or construction. They resist any notion of deferring the question to the GPMC. They point out that no grievance regarding this

question was referred to the GPMC for determination and that therefore the GPMC has no role to play.

18. The role of the GPMC was described in *Delta Catalytic 1*, above, at ¶14, which reads:

> ¶ 14 The first question for the Board is what weight or effect to give to the decisions made by the GPMC. The Board begins by acknowledging the very real value of the GPMAs, which have been entered into by the industry major players, and which have been applied to work in this sector for decades. Twelve [now 13] international building trade unions have chosen to enter these agreements, and have chosen to regularly renew them over this time period. These trades have made the assessment, shared by the employer parties to these agreements, that it makes economic and business sense in this sector for a separate legal and regulatory regime to exist for in-house industrial repair and/or maintenance (the word "maintenance" is used here as parties to the GPMAs describe such work in their agreements). These agreements pre-date the existence of the statutorily imposed province-wide ICI collective agreements, and through them, the participants have tried to treat differentially work of this nature, in recognition of the competitive realities prevalent in this sector. The Board has no doubt that the existence of these arrangements, and their application, has enabled the signatory building trade unions to receive work for their members which would otherwise have been contracted on a non-union basis.

19. In that case the Board declined to defer jurisdiction over the maintenance v. construction dispute to the GPMC. However, the Board has deferred to the GPMC where a referral of the issue was made by one of the parties to the dispute, a decision was made by the GPMC, and it would have been patently unfair for the Board to allow that party to re-litigate the issue: *Delta Catalytic Industrial Services Limited*, [1996] OLRB Rep. Mar./Apr. 233, ¶34.

20. We have retained jurisdiction here in large measure because neither the Union, nor the Employer, referred this matter promptly to the GPMC for decision.

21. We have now heard all of the evidence and we are in a position to make the maintenance v. construction determination. We therefore decline the request to defer the determination to the GPMC.

The BMS/ESD Project

22. Petro-Canada's white oils unit produces high grade white oils for the pharmaceutical and food industries. Over the years Petro-Canada has had various incidents, fires, which have caused damage to its assets and, on occasion, injury to individuals. Following the last fire in 1993, the Company studied the causes of the incidents and concluded that the heaters in the system were the most frequent cause. Petro-Canada determined that its burner management system needed upgrading. It scheduled its turnaround or maintenance shutdown for September 7, 2005 when it thought the BMS/ESD changes could be made. (Petro-Canada turnarounds are scheduled every four years and planning for each turnaround begins years in advance). Typically, Petro-Canada likes to perform as much maintenance prior to the turnaround as is safely possible, without shutting down the plant, so as to limit the duration of the full shutdown, as far as can be done.

23. Petro-Canada's heaters were installed in 1986-87, when it acquired the site. Safety standards have changed since then. Petro-Canada wanted to modify and upgrade the heaters to meet current CSA (Canadian Standards Association) standards. The heaters heat the fluid passing through them. Under the original system, if for some reason the flame in the heater went off, gas in the pipes would have to be purged manually by an operator, and the heater re-lit manually. This could be dangerous. Under the new system, after the BMS/ESD project, the white oils control room is able to monitor the heaters, to regulate them individually, and to purge and re-light them automatically. The project envisioned that each heater was to have its own skid, its own set of valves, solenoids and piping and a flame scanner on both sides, rather than on one side only, as existed. There was to be a fibre-optical cable link between the white oils control room and the BMS/ESD. It enables the operators in the white oils control room to monitor the flames of the burners through the flame scanners, to shut-off the flames, and to re-ignite the flames remotely by activating the igniters, when necessary. If the igniters shut down, an alarm will signal under the ESD and the burner will switch off automatically.

24. The BMS/ESD project involved the installation of an instrument cable and underground duct bank grounding systems for the emergency shutdown system, included the installation of new igniters and flame scanners, a new blast-proof shelter (housing the new safety management system), manufactured elsewhere, and the installation of the power supply to the new shelter, with circuit breakers. Each heater has one or more flame scanners.

25. The electrical work involved connecting the electrical power to the new instrumentation, running the cable tray from the junction box to the skid at each heater. This involved burying and pulling tech cable and fiber optic cable (the power lines being separated from the communication lines) over the distance from the white oils control room on cable trays to relay boxes beside the burners and the new BMS/ESD shelter. The cable and the cable trays were all new equipment.

26. The scope of the electrical work on the BMS/ESD project involved: disconnecting and removing wiring; disconnecting jumpers; removing relays; removing instruments; removing flexible conduit; removing the existing thermocouples; installing an underground ductbank; installing circuit breakers; running cables; installing cable tray; pulling cables in the cable trays; installing ground conductors; installing conduit around the heaters; terminating multi-conductor cables; terminating the cables at the heaters; installing and terminating the wiring of field junction and relay boxes, pushbuttons, pilot lamps and selector switches on the main control panel, including nameplates; installing the tubing and wiring for the flow transmitters, temperature transmitters, thermocouples, pressure transmitters and ultra violet flame scanners; re-arranging the wiring in the existing junction box; and supplying consumables, like weld rods, fixing, fasteners, brackets, clamps and other such hardware.

27. In practical terms this entailed the following electrical work: installing new cable tray, cable, conduits (the pipes) and instruments; the onsite fabrication of brackets to hold up the cable trays; new grounding of the BMS shelter; unhooking old equipment and disconnecting and removing obsolete instruments; fitting junctions and other electrical panels to control the relays and connecting the new thermal couples, new fuel skids and flame throwers at the heaters; doing terminations of cable at the new BMS shelter.

28. The work did not include the following: installing the BMS/ESD shelter and electrical utility supply power; installing the heater fuel skids and the skid-mounted operator control panels; installing the multi-conductor cables; installing the Experion equipment located in the rear of the main control panel; supplying the instruments; terminating the telephone and fibre-optic cables; modifying the wiring in the existing relay panels; demolishing the instruments; configuring the DCS in the main control room; configuring the safety manager in the BMS/ESD shelter; configuring the Experion system in the BMS/ESD shelter and control room; and calibrating the loop checkout and commissioning the instruments.

29. The BMS/ESD project was about 60% electrical work and about 40% mechanical.

30. The project resulted in a safer operation of the system. There was no productivity improvement, no change to the temperature of the heaters. The heating controls and the shutdown system were to be upgraded so that the heaters operated more safely and so that the heaters could be isolated, shut down and re-started remotely.

31. Petro-Canada could have elected to replace the heaters. This would have made the BMS/ESD project unnecessary. If Petro-Canada had chosen to replace the heaters with newer technology, the skids would have been unnecessary, there would have been less junction box work required, and fewer wires to the white oils control room. Instead, Petro-Canada decided to improve some of the controls on the existing heaters.

The CMP project

32. The CMP was initiated to reduce the chloride accumulation in the gas feeds. In 2003 there was a large explosion at the refinery. The cause was determined to be the chloride accumulation in the fuel feeds, which, when combined with moisture, created hydrochloric acid that, over time, ate through the piping, allowing the gas to escape, causing the explosion. Prior to the explosion, Petro-Canada had supposed that the chlorides could not pass through the de-waxing, first phase of the hydro treatment unit to the second stage. It found that this was not so, and that the chlorides were passing to the second stage. A change in the quality of the fuels also affected the level of chloride accumulation. Petro-Canada has, increasingly, to use sour crudes from North America, which are cheaper than the sweet crudes from the Middle East, but they have more chlorides.

33. The method chosen to mitigate the chlorides was to increase the operating temperature in the early stages of the refining process. To do so, Petro-Canada needed a hot, high pressure separator, a new exchanger, to replace the existing cold, low pressure separator. This entailed replacing the existing vessel with a new CMP tower, of the same dimensions, acquired from abroad. The project involved the installation of a new tower and the electrical connections to make it operable. The size and purpose of the tower remained the same; what changed was the metallurgy to deal with the higher fluid temperature, from carbon steel to a chrome alloy. Two exchangers and a new wash water pump were added to prevent the chloride salts from concentrating, and to eliminate them downstream. A new variable speed drive was added to the electrical sub-station supplying power to the unit. The productive capacity of the unit remains the same; what improved as a consequence of the CMP was the safety of the operation: the chloride accumulation in the gas was reduced, resulting in less risk of pipe corrosion, and hence less risk of an explosion.

34. The method used by Petro-Canada to effect the CMP project was to install the new components alongside the existing tower and piping. This was so that the existing operation was not interrupted while the upgrading was taking place. During the November 2006 shutdown the switch was made from the old to the new system.

35. The scope of the CMP electrical work involved connecting the above grade grounding and lighting (the installation, termination and support of the ground conductors, lighting fixtures, conduit and supports, wiring up and connecting the cable to the existing lighting panels); lighting the valve platform (installing lighting fixtures, conduit, supports, wiring up and connecting to the existing lighting panels); installing conduit on the rack attached to the new hydrogen unit; pulling cable through an existing underground conduit to connect the substation to the floor of the new hydrogen unit; fitting new lighting to the three levels of the new CMP tower; running cable and installing cable trays above ground, fabricating and hanging brackets from the white oils control room to the new CMP tower and from there, underground, to the sub-station; pulling cable; fitting a new breaker to the switch gear in the sub-station; connecting the new exchangers; and connecting the new water wash pump.

36. The CMP work was approximately 75% for pipefitters, 10% boilermakers, and the rest made up of electrician, insulator and carpenters' work.

37. The electrical work on the BMS/ESD and the CMP principally involved the following: installing ground cable, running conduit from existing instruments to their re-located areas, erecting cable tray, doing cable terminations.

38. The changing of piping and conduits, cable and wiring for lighting is ongoing at the Petro-Canada site. The removal of the old electrical components is known as demolition (a term used differently than under the Act). Petro-Canada and Jacobs Catalytic regard this work as routine maintenance.

The scale of the projects

39. The BMS/ESD work began in the third week of April 2005, the CMP in about July 2005. The projects lasted for many months, until the turnaround which was postponed from September to November 2005, and afterwards. The turnaround began on November 6 and lasted until December 23. There was a sudden and significant increase in the number of trades on site during the turnaround. The Company employment of tradespersons peaked at 1,080 in the third week of November. The work on the two projects continued until January 7, 2006, when a fire occurred at the Petro-Canada site, causing extensive damage. The BMS/ESD and CMP were put on hold until the fire damage had been repaired, in about mid-March 2006. Work on the projects then resumed. The CMP was completed with a small crew of electricians in about June 2006.

40. At the hearing Union counsel sought details from Petro-Canada of the total cost of the two projects, but we upheld the Employer's objection to revealing the information, on the basis that it was commercially sensitive and not relevant to our determination of whether the nature of the work was maintenance or construction. We recognize, though, that the BMS/ESD and CMP were significant projects lasting several months, involving a great many tradespersons. We ordered the Employer to produce the document showing the difference in the calculation of the GPMA and ICI agreement rates for electrical workers on site for the two projects. Gord Duggan,

the Company's Eastern Canada General Manager, estimated the cost difference between what was paid to the electricians working on the BMS/ESD and CMP projects under the GPMA and what they would have been paid had they worked under the ICI agreement. The BMS/ESD project difference is about $73,000; the CMP project difference is about $81,000.

Was the work maintenance or construction?

41. The Act defines the work of the construction industry, at s. 1(1):

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

42. The size of a project is not determinative of its nature. A small project may be construction, and a large project maintenance. Nevertheless, the size of project may affect its characterization depending upon the context. The content and purpose of the project, and the extent of the change, the context, are what matter: see *Delta Catalytic 1*, above.

43. The Company sees both BMS/ESD and CMP projects to be for the purpose of preventive maintenance, to prevent failures in the system, to prevent explosions and fires and risks to personal safety and property. The company argues that the distinction between construction and maintenance is the following. Construction is done for the purpose of enhancing or improving the production capacity of the plant. Maintenance is done to ensure the ongoing operation of the plant, to prevent it from ceasing to function efficiently, and to keep it operating, without improving its productive capacity. It further argues that new equipment was installed not to increase production capacity, but to maintain and improve the functioning of the plant. The company refers to Clause 1604 of the Union's Local Appendix to the Principal Agreement, Definitions, which reads:

> (a) Maintenance shall be defined as any work performed within the limits of the Owner's building or other locations related directly thereto on existing structures or equipment to keep a manufacturing, industrial, commercial or utility plant and facilities operating. Maintenance work shall include replacement of existing individual items of machinery and equipment with new units. It is understood that this concept would not include replacement of an entire production system installation in a plant in order to increase production.
>
> (b) the term "existing", used within the terms of this Agreement is limited to a constructed unit already completed and shall not apply to any new unit to be constructed in the future, even though the new unit is constructed on the same property or premises.

The Employer argues this definition is instructive because it includes as maintenance, in the Principal Agreement, the installation of new, replacement machinery and new equipment and of new units.

44. The principal purpose of the BMS/ESD and CMP projects was to reduce fire in the refinery. Employer counsel argues that this is the essence of maintenance: to allow the plant to keep running without catching fire.

45. In contrast, the Union and the ECAO argue that the work performed on the BMS/ESD and CMP projects was designed to restore a system or part of a system that had ceased to function properly. They say that the CMP was designed to improve the functioning of the gas pipes, to limit corrosion and to prevent fires. While the project may have had a safety aspect, there would be productivity gains for Petro-Canada in less downtime to deal with fires and fire damage. They say this is construction work.

46. The Union relies on the definition of the "construction industry" under s.1(1), the definitions section, of the Act: "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site.

47. The Union says that the work performed on the two projects was "constructing, altering, repairing or demolishing structures, pipe lines, or other works at the site". It argues that the work therefore falls under the Principal Agreement.

48. The Union says that new work was done: a new shelter was connected, there were new cable trays, new terminations, all to permit and create control of the heaters through the BMS and the control room. This, according to the Union, is an upgrade project, not maintenance. The Union points out that the project involved the upgrading of the heaters with new electrical panels, flame scanners and thermocouples to feed the heaters, in order to measure temperature or pressure. The new system has a very sophisticated computer system installed to prevent explosions or fires and to eliminate the downtime produced by fires. The heaters can now be tripped from the white oils control room and the individual fuel skids are more sophisticated than previously. A remote way for shutting down and re-lighting the heaters has been installed which is much superior to the former system of handling the heaters manually and individually. The new BMS shelter delivers much more information to the white oils control room than was the case previously. The new emergency shutdown system permits the remote shutdown of the heaters. This was not possible previously. There is now control from a distance, electronically, centrally, rather than at each heater. This improves the system and enables the Employer to operate with much less risk of a fire or an explosion, so with less downtime. Union counsel says the same consideration applies to the CMP. There will be less downtime because there will be less risk of an explosion. This is a productivity improvement (see *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613, at ¶¶32, 34). All of these improvements, Union counsel suggests, go beyond maintenance, into construction.

49. The Union points out that much of what was done was entirely new. A new hydrogen tower and a new BMS/ESD shelter were installed. They had to be wired by Jacobs Catalytic's electricians. Other structures were established that had to be properly wired. This involved new cable trays, new cable, new grounding, all of which the Union says is new construction.

50. The Board has an extensive case law on what constitutes construction and what maintenance. The seminal case, *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477, sets out the standard for determining the distinction between work which

is maintenance and work which is construction. At ¶28, the Board explains that "maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility". Repair is part of the definition of construction work. In ¶29, the Board continued:

> Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. 'Maintenance' and 'repair' are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

51. In *Quinard Limited*, [1982] OLRB Rep. July 1054, the Board took the view, at ¶9, that work done on existing equipment and piping to keep it functioning properly is maintenance work. But taking out large pieces of existing equipment from the production process and replacing it with new equipment goes beyond maintenance work and constitutes construction work within the ICI.

52. Similarly, in *Briecan Const. Limited*, [1989] OLRB Rep. May 417, the Board found, at ¶32, as follows:

> The additions and modifications that were made during the shutdown clearly were done to improve the cooling system, conserve valuable water resources and facilitate easier maintenance on the new meters without having to shut off the gas. All of the work performed in connection with the rebricking or restoring of the furnace, with demolition, repair or new construction is construction work as defined by the Act.

We take from this case the principle that work done to improve and facilitate future maintenance, such as lighting the heaters in a safer and more efficient manner in not necessarily maintenance and may constitute construction.

53. In *Francis H.V.A.C. Services Ltd.*, 2000 CanLII 13330 (ON L.R.B.) (June 12, 2000), the Board gave the following guidance:

> 9. It is not difficult to find general definitions of the distinction between construction and maintenance in the Board's jurisprudence. Essentially construction work involves the addition to an existing facility, results in an increase of the production capability of a facility, or restores to a working order a system which has ceased to function or to function economically. Maintenance work sustains, maintains or preserves an operating facility or part thereof, and enables it to operate efficiently or to attain its production capacity.

At ¶11, the Board said, "generally speaking, the replacement of a system is construction work and the replacement of a component is maintenance work."

54. In *Delta Catalytic 1*, above, some useful comments are made at ¶24 regarding changes to electrical equipment:

> ... The nature of electrical work will inevitably mean that new hardware is installed as part of the work, whether it be wiring or electrical or electronic devices, but this does not inevitably mean that the work is "construction". In some cases, work of this nature may not be meaningfully different in concept from the installation of new piping, new iron plating or new insulation. While the raw material involved may be new, that fact alone will not necessarily be determinative. The Board still must consider the nature and purpose of the work, in the context of the particular facility, project, system, or machine in question. The replacement of an outdated electrical measuring device with an updated electronic measuring device, which may well be more efficient and enhance the measuring capability, will not necessarily be "construction" work, where that is all that is being changed, and where the nature and purpose of the system has neither changed nor has its overall capability or productivity been enhanced. The result will depend on the extent of the change and its nature and purpose. Similarly, the installation of new gauge wiring for old gauge wiring will not necessarily be "construction" work. It is the context and purpose of the work which must always be considered and not only the detail of the work that the particular trade is asked to perform.

55. What do we take from all of this? Our task is to determine whether the work is construction as defined in the Act and therefore falls under the Principal Agreement. There was no substantial productivity improvement in the BMS/ESD and CMP changes. That was not the purpose, though some slight productivity enhancement was likely to be an indirect consequence of the changes made to the two systems. The projects were large and they involved thousands of hours of electrical work. Both systems were upgraded. The BMS/ESD changes considerably improved the monitoring of the heaters and they enabled a safer method to shut down and rekindle the heaters. The CMP made the oil flow safer, with less risk of explosions, by introducing the new hot high pressure separator and the new exchangers. These were upgrades to the two systems, improving their functionality.

56. Board Member Haward dissents from the conclusions that follow.

57. Work performed by the Company on existing equipment and machinery, including replacement of existing individual items of machinery and equipment with new units, is most likely maintenance. In our view, the work on the heaters of the BMS/ESD was of this sort. The changes to the heaters, the improved monitoring and the other changes we have described, were in the nature of replacing existing individual items of equipment with new units. The changes involved replacing an outdated monitoring method with an updated electronic monitoring process. The change did not involve enhancements or additions to the production process itself; there was no replacement of an entire system and the change was not to increase production. The existing system was maintained, though with an improved method for establishing that it is functioning. We conclude therefore that the work on the heaters of the BMS/ESD was maintenance, and not construction.

58. Union counsel urges us to see the BMS/ESD project in much the same way the Board did in *Delta Catalytic 1*, above, at ¶¶ 30-32, dealing with the cooling tower reliability. There are

similarities, but the key difference is that, there, the change was not only to the monitoring system (as here), but also to the chemical production process itself.

59. The work on the BMS shelter was new construction. It involved installing electrical cable and connections to a new building. We find this work was construction.

60. So, to distinguish the parts of the BMS/ESD project that were maintenance from those that were construction we made the following division. All of the electrical work from the white oils control room to the heaters and to the pump alley was maintenance work; so too was all of the electrical work to and around the heaters. The electrical work around the BMS shelter – the hook-ups and terminations – and linking it to the heater cable, and the underground feed from the shelter to the substation, was construction work. (See *Delta Catalytic Industrial Services Ltd.*, [2001] OLRB Rep. July/Aug. 983 (July 25, 2001), ¶¶ 63-64 (referred to as *Delta Catalytic 2*)).

61. As with the BMS/ESD project, some of the CMP was construction work and some was maintenance. The CMP did not involve a direct increase or improvement in production, so much of the work done on the project was maintenance. It was performed to preserve the functioning of the system. But some of the work was directly associated with the replacement of the previous production process, with improvements to the functioning of the system (see *Kennedy Electric Limited*, [1996] O.L.R.D. No. 1389, ¶¶75-80). This work was not merely to replace existing items of machinery or equipment, it was not a mere upgrade to install new technology, like the BMS/ESD work around the heaters. The CMP involved the insertion of a new unit, enabling the system to operate differently, at a higher temperature than was possible previously. The change effected was to increase the operating temperature in the early stages of the refining process. A new production process was made possible by the changes made as a result of the CMP. This type of change goes beyond maintenance; it is a qualitative improvement to the refining process. We find therefore that the work in and around the new CMP structures was construction work, which ought to have fallen under the Principal Agreement (see *Delta Catalytic 2*, ¶54).

62. To distinguish between the maintenance and construction features of the CMP, all of the cabling and cable tray between the white oils control room and the pump alley, up to the new CMP tower, was maintenance work. The electrical work around the new CMP tower, the work associated with the new exchangers and the new variable speed drive, and the underground feed from them to the substation was construction work.

63. Having reached these conclusions on the nature of the work done on the projects, it is necessary for us to consider the Company's estoppel defence. To do so, it is necessary first to review the communications between the Union and the Company at the outset of the work.

Communications between the Union and the Company

64. The discussions between Jacobs Catalytic and the Union need some elaboration because they inform Jacobs Catalytic's estoppel defence. George Scott was the Project Superintendent for Jacobs Catalytic on the Petro-Canada site at the relevant time. He was in charge of all of the unionized trades employed by the Company, he did the estimating for the Company and he ensured that Jacobs Catalytic's work was done properly under the terms of the arrangements reached with Petro-Canada. He was responsible for Jacobs Catalytic's involvement

in the BMS/ESD and CMP. He met with the various trades (pipefitters, boilermakers, carpenters, insulators, labourers) and, in each case, confirmed the work would be done under the GPMA.

65. Mr. Scott's counterpart at the Union was Cameron Commandant, a business representative. At the time he testified, more than 18 months ago, he had been a member of the Union for 36 years and he had worked as a qualified electrician for 38 years. He has been a Union business representative since 2001. Mr. Commandant reported to Joe Fashion, the Union's Business Manager.

66. Mr. Scott learned of the BMS/ESD project in the first week of April 2005. The first work on the project was pre-fabricating the cable trays, done in the third week of April 2005 by the electricians. By this stage the full scope of the work had not yet arrived from Petro-Canada. Mr. Scott arranged that Mr. Commandant come to the site to discuss which trade would do the work. The meeting took place on May 3, 2005 at the Jacobs Catalytic trailer on the Petro-Canada site. Mr. Commandant was shown all of the preliminary specifications and drawings for the BMS/ESD project. Mr. Commandant agreed with Mr. Scott that the multi-craft structural steel work belonged to the ironworkers. Mr. Commandant was then given a tour of the site by Brian Regan, a Union member and the general foreman of the project, working under Mr. Scott. Mr. Regan showed Mr. Commandant the work that was being done on the BMS/ESD project.

67. Upon returning to the Jacobs Catalytic trailer, Mr. Scott and Mr. Commandant went outside to have a cigarette. There is some difference between Mr. Commandant's and Mr. Scott's accounts of what was said between them. According to Mr. Scott, he raised the issue of doing the BMS/ESD project as maintenance, under the GPMA. He explained the work that Jacobs Catalytic would be doing on the project. Mr. Scott explained he had to give an estimate to Petro-Canada of the labour costs of the project and he did not want to have some claim in the middle of the project that the work should be done ICI. Mr. Commandant said he was not very familiar with the GPMA, and he would have to do his homework. Mr. Scott got a copy of the GPMA and he and Mr. Commandant looked at the definition of construction and maintenance in the GPMA. Mr. Scott said that the work to be done fell within the definition of maintenance work. Mr. Commandant replied that he understood the work would be done as maintenance under the GPMA. He mentioned though that he would have a hard time explaining it to his members.

68. Mr. Commandant's version is slightly different. He says he told Mr. Scott that he thought the work was ICI. He came to the conclusion that the work was ICI construction because the electricians were fabricating brackets and installing cable tray. He says Mr. Scott explained that the project was not intended to increase the capacity of the plant. On this basis Mr. Scott concluded that the work was maintenance. Mr. Commandant says that he told Mr. Scott he would have to get back to him. Mr. Commandant says he then went back to his office and he researched the files available to him. He could find nothing to assist him.

69. A further discussion took place between Mr. Scott, and others, and Mr. Commandant on June 3, 2005, this time concerning the CMP project. The project manager wanted to ensure that all of the trades had agreed that the work would be done under the GPMA. The key trade, the pipefitters, met with Mr. Scott and the project manager in the last week of May 2005. They confirmed the work was maintenance, and that it would be done under the GPMA. Mr. Commandant was not available then so a separate meeting was arranged for him. Jacobs Catalytic's general foreman and the project manager were present.

70. Mr. Commandant was shown the preliminaries of the scope of the work, a plot plan and some drawings. He later obtained copies of the documents containing the scope of the work. The project was explained to Mr. Commandant. He was told the work was maintenance under the GPMA, and why, and that it would be done under that agreement. Mr. Commandant says that, although most of the work would be done by pipefitters, his impression was that the electrical work would be construction, not maintenance, because it involved a change in the instrumentation. Mr. Commandant says he did not respond: he neither indicated agreement nor disagreement. He says he told Mr. Scott he would get back to him on the matter. Mr. Scott disputes this and says that Mr. Commandant's response was that he probably agreed with the work being done under the GPMA, but that his members would not agree. Mr. Scott gained the impression that Mr. Commandant was accepting the work would be done as maintenance under the GPMA and that there would be no challenge to it.

71. Electricians were hired to work on the CMP after this meeting.

72. If Mr. Commandant is to be believed, he did not get back to Mr. Scott on either project, as he had promised, until August 2005 when he sent a decision of the Board to Mr. Scott, as described below. Mr. Commandant says he was receiving complaints from Union members during August 2005, which also inspired him to file the grievance concerning the BMS/ESD project.

73. The difficulty with Mr. Commandant's evidence is that he contradicted himself several times. In chief, his evidence was that he had told Mr. Scott that he regarded the work as being ICI. In cross-examination he contradicted this evidence, stating that he told Mr. Scott that he did not disagree with his opinion that the work was maintenance. He said that he was not sure whether the work was ICI or maintenance, and that he did not contradict Mr. Scott when he said that the work was to be done maintenance under the GPMA, not under the Principal Agreement. Mr. Commandant also admitted that he did not say to Mr. Scott that he would need to research the question and get back to him.

74. The work then proceeded and more electricians were hired by Jacobs Catalytic from the Union hiring hall. Each dispatch request for additional tradespersons indicated that the work was maintenance under the GPMA. From a relatively slow start, from mid-June onwards, the hours worked by electricians on the BMS/ESD project increased steadily. By the time of the November shutdown, the number of electricians peaked at 35. There was no suggestion by the Union, from the time of Mr. Scott's and Mr. Commandant's conversation on May 3, until the Company received its grievance on September 5, that the work on the BMS project ought to be done as ICI construction work, and not as maintenance.

75. From all of the evidence we conclude that Mr. Commandant did nothing about the BMS/ESD or the CMP projects in the period between his discussions of the projects with Mr. Scott and August 12, 2005. We also conclude, despite Mr. Commandant's evidence to the contrary, that he had no intention of filing a grievance before the union meeting on August 11, 2005.

76. A union members' meeting took place on August 11, 2005. Mr. Commandant was present. A member, David Hussey, formerly a Union business representative, complained rather vocally that he was working for Jacobs Catalytic at the Petro-Canada site and he inquired why he

was being paid at the GPMA rate, and not the ICI rate. The Union's newly elected president was not present at the meeting, which was being chaired by the Business Manager, Joe Fashion, Mr. Commandant's superior. There was some history between Mr. Hussey and Mr. Fashion because they had run against each other in a hard fought election to the position which Mr. Fashion succeeded to. Mr. Fashion was somewhat taken aback because Mr. Commandant had not kept him apprised of the issue. Mr. Fashion undertook to look into the complaint. The minutes of the meeting read as follows:

> Brother Dave Hussey asked about construction work vs. maintenance work and Petro-Canada. Brother Joe Fashion explained that construction work being performed under the President's Agreement [the GPMA] may be grievable and will look into it.

77. The following day, August 12, 2005, Mr. Commandant spoke to Mr. Fashion about the complaint. Mr. Commandant explained what he knew of the situation to Mr. Fashion. Mr. Fashion asked Mr. Commandant if he was going to file a grievance and he confirmed he would. For some reason, Mr. Commandant denies that the union meeting on August 11, 2005 and the complaint raised by Mr. Hussey had anything to do with his decision eventually to file the grievance. Not much turns on this point, but we find the denial unconvincing. We have little doubt that the eventual filing of the grievances was occasioned by Mr. Hussey's complaint at the union meeting on August 11, 2005.

78. Mr. Commandant says that, although he cannot remember the date exactly, he thinks that he obtained copies of the scope of the BMS work documents from Mr. Scott. In his evidence-in-chief he said he obtained copies of the scope of the BMS/ESD work in July 2005. Under cross-examination, he thought it was during the first two weeks of August 2005. He did so in order to prepare himself for filing a grievance. Mr. Scott says that Mr. Commandant came for the documents after August 12. The company records show that Mr. Commandant came to the Petro-Canada site on August 4 (from 2pm to 3:15pm), on August 15 (from 11am to 3:30pm) and on August 24 (from 1:45pm to 3pm). Bearing in mind that Mr. Commandant testified nearly a year after the event and that he had no document to corroborate his recollection, we conclude that Mr. Scott's version of events is the more likely. We find that, in all likelihood, Mr. Commandant came to collect the documents after his discussion with Mr. Fashion on August 12, likely on either August 15 or August 24.

79. Sometime after August 12, 2005, a runoff election occurred and the now ex-president, Bob Gullins, was voted out of office. The newly elected president, Barry Stevens, took over his office and was cleaning it out. Mr. Commandant inquired of Mr. Stevens whether there were any files on Jacobs Catalytic, and, in the process, he came across the Board's decision in *Delta Catalytic 1*. It is notable that Mr. Hussey, who raised the issue at the union meeting on August 11, is listed as representing the Union in that case (although he is wrongly cited as "D. Husky"). It was at this stage that Mr. Commandant says he confirmed for himself that the work being done was not maintenance, but was construction.

80. Not long afterwards, on September 15, 2005, Mr. Scott and Mr. Commandant had a conversation in which Mr. Commandant undertook to provide Mr. Scott with a copy of the *Delta Catalytic 1* decision. On September 19, 2005, Mr. Commandant faxed a copy to Mr. Scott.

81. Mr. Scott received no communication regarding the CMP work from Mr. Commandant or the Union in the period between June 3 and November 4, 2005, roughly at the time of the Petro-Canada shutdown, when he received the Union's grievance alleging that the electrical work on the CMP was construction, not maintenance. By this stage work on the CMP was 75% complete.

82. From the above, we discern the following. Mr. Scott indicated to Mr. Commandant that the work was to be done under the GPMA, not the Principal Agreement, and Mr. Commandant did not contradict this view. Mr. Commandant conveyed to Mr. Scott, albeit on both occasions (in May and June 2005) somewhat less than effusively, that he conceded that the Company would do the BMS/ESD and CMP electrical work as maintenance under the GPMA, and not as ICI construction work, but that his members would not be happy. Mr. Commandant had some doubts about the matter, but he yielded to Mr. Scott's persuasion and did not contradict him, despite his thinking that the work might be ICI. Mr. Scott's impression of their discussions was that Mr. Commandant would meet some opposition from the Union members working on the site, but that Mr. Commandant would not dispute that the work was being done maintenance, not construction.

83. As a consequence, we find that Mr. Commandant had no intention of challenging Jacobs Catalytic's decision to perform the work as maintenance, not construction. This changed on August 11, 2005, as a result of the Union meeting. Mr. Fashion was somewhat surprised and put on the spot by the questions posed by Mr. Hussey as to why construction work was being done under the GPMA. Mr. Fashion undertook that the matter would be investigated. He then instructed Mr. Commandant to look into the matter and to file a grievance. Mr. Commandant then belatedly carried out this instruction for the BMS/ESD project, after having found the Board's decision in *Delta Catalytic 1*, above.

The Company's estoppel argument

84. Company counsel argues that, if any of the work was construction and not maintenance, then the union is denied the entitlement of enforcing its rights under the ICI agreement under the doctrine of estoppel. The Union responds that the elements to establish that the doctrine of estoppel applies are missing; in any event, it says, under the Act there cannot be an estoppel against the enforcement of the Principal Agreement.

Can a promissory estoppel apply against a provincial ICI agreement?

85. We deal first with whether the defence of estoppel can apply against the enforcement of rights under the Principal Agreement.

86. The Union and the ECAO argue that no party can contract out of the Act: *Empress Graphics Inc.*, [1989] OLRB Rep. May 587, ¶¶16-22; but cf. *Bucyrus Blades of Canada Ltd. v. McKinley*, 2005 CanLII 1491 (ON S.C.D.C.) (January 24, 2005) and *Better Beef Ltd. v. MacLean*, 2006 CanLII 17930 (ON S.C.D.C.) (May 31, 2006). Union and ECAO counsel amplify this by contending that no party can contract out of the provisions of a province-wide collective agreement, such as the Principal Agreement. Any agreement not to enforce the Principal Agreement would therefore be null and void. If a written contracting-out of the Principal Agreement is not enforceable, *a fortiori* an estoppel could not be enforceable against the Principal

Agreement. In other words, if the Principal Agreement applies to the work, then whether the Union signed a document agreeing not to apply the Principal Agreement, or whether it made representations that it would not enforce the Principal Agreement (as the Employer argues), the Principal Agreement would still be enforceable. A signed contracting-out of the Principal Agreement, or a representation not to enforce the Principal Agreement, are both equally unenforceable, according to the Union and the ECAO. The compelling reasons for why there should be only one provincial agreement in each trade of the construction industry are described in *C.I.R. Painting and Industrial Coatings Ltd.*, 2005 CanLII 5221 (ON L.R.B.) (March 1, 2005).

87. For the proposition that there can be only one provincial agreement in the ICI sector of the construction industry for the electrical trade, Union and ECAO counsel refer to the provisions of s. 162 of the Act. They read:

> **Agency shall make only one agreement**
> 162. (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.
>
> **No agreement other than provincial agreement**
> (2) Subject to sections 153, 161, 163.1, 163.2 and 163.3, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Section 163(2) provides that a provincial agreement is binding on all those affected by it.

88. The import of the Union's and the ECAO's submission is that, because there can be only one provincial collective agreement and the parties to it are bound, it is not possible for the Union and the Employer to contract-out from it. Agreeing to do construction work at a rate of pay less than that prescribed by the Principal Agreement would constitute contracting-out of the Principal Agreement, and such an agreement would not be enforceable, given the provisions of s. 162 and s. 163 of the Act. If the work performed was construction, and not maintenance, then it would have had to be done under the Principal Agreement, irrespective of any undertakings made by Mr. Commandant to Mr. Scott (see *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357; *Sikora Mechanical Ltd.*, [1982] OLRB Rep. June 941; *Quinard Limited*, [1982] OLRB Rep. July 1054; *All-Pro Contractors*, [1982] OLRB Rep. Aug. 1109).

89. *Culliton Brothers Limited*, above, and *Ontario Power Generation Inc.* 2001 CanLII 6593 (ON L.R.B.) (May 14, 2001), at ¶13, state that the doctrine of estoppel cannot be invoked to prevent the operation of a public statute. In *Culliton Brothers Limited*, at ¶21, the Board treated an estoppel against the application of a provincial agreement as being the same as an estoppel against the application of a public statute. In our view, however, there is a distinction between these notions. We accept that generally the doctrine of estoppel cannot apply against the application of the Act itself, particularly, as counsel for the GPMC argues, when public values,

public policy considerations are at stake. One cannot waive fundamental rights one has under the Act, e.g. to organize a trade union, to apply for certification, etc. But the principle that estoppel does not apply to the operation of a public statute, where a public value is at stake, does not necessarily entail that estoppel cannot apply to an agreement concluded pursuant to the Act, including a collective agreement and a provincial agreement.

90. It is now trite law that promissory estoppel can apply to the enforcement of a provision in a collective agreement (*Metropolitan Toronto Civic Employees Union and Metropolitan Toronto*, (1985) 50 OR (2d) 618). One party may represent to another that a provision of the collective agreement will not be enforced and the other party, acting to its detriment on the strength of that representation, may use the doctrine of estoppel to resist the attempted enforcement of the provision. This is now a commonplace in labour relations, provided the requirements of promissory estoppel are met.

91. As mentioned, Union and ECAO counsel refer to the provisions of s. 162 of the Act, that there can be only one collective agreement and that there is to be no other collective agreement in the ICI sector of the construction industry. There are equivalent provisions in s. 55 to s. 57 of the Act for collective agreements other than in the ICI sector of the construction industry. A promissory estoppel can apply to a collective agreement between two parties despite these provisions. Why, then, should the same not apply to a provincial agreement? Why should an employer, in the position of Jacobs Catalytic in this case, not be able to assert promissory estoppel against the Union, to resist the claims it makes in these grievances?

92. We recognize there is a difference between a provincial agreement in the ICI sector of the construction industry and a collective agreement between two parties. The interested parties to a provincial agreement are not merely a particular employer and a particular union. The non-enforcement of a provision of a provincial agreement may have implications for all of the employers and unions that are bound by the provincial agreement, not merely for the employer asserting the estoppel and the local union which has made the representation. However, in our view, this reality does not mean that the estoppel is unenforceable. It may entail, in the event an estoppel is successfully asserted, in appropriate circumstances, that the estopped party may have some liability to others having rights under that agreement, but it does not mean that the party relying upon the estoppel is deprived of its defence.

93. We do not suggest by this that an estoppel can apply generally against the validity of a provincial agreement. We say that, in specific circumstances, based on equity, it might be unconscionable for a particular beneficiary of rights under the provincial agreement to enforce those rights. We do not suggest that the right itself is limited or overruled by the estoppel; it is the enforcement thereof which, in particular circumstances, may be estopped.

94. There are examples of when the Board would not enforce a provincial agreement where a union has waived entitlements under that agreement: where the union has agreed to waive certain damages to which it is entitled under the agreement; where the union has agreed for a period of time to allow certain work to be done other than as required under the provincial agreement. The Board will scrutinize concessions made by a party concerning the enforcement of rights under a provincial agreement, but it will not always nullify those concessions. It will consider the equities and labour relations implications of the situation. Similarly, if the elements of an estoppel are established against the strict enforcement of rights under a provincial

agreement, the Board will uphold the estoppel and not require the strict enforcement of the provincial agreement. See particularly the discussion of estoppel by the Board in *Toronto Dominion Bank*, [1995] OLRB Rep. May 686, ¶70 onwards; and see also *Losereit Sales and Services Ltd.*, [1983] OLRB Rep. July 1090; *Creative Design and Improvement Inc.*, [2004] CanLII 2951 (ON L.R.B.) (July 5, 2004).

95. As counsel for the GPMC points out, there are no public policy considerations in this case which might deter us from applying an estoppel against the strict application of the Principal Agreement. There are no particular public values at issue here. The work has been done by the electricians from the Union in both projects, on the same site. This is simply a case about which collective agreement applies to the work. There is no issue of non-union contractors, no issue of the GPMA being a sweetheart contract (the GPMA in fact pre-dates the era of provincial ICI bargaining). No values of the Act are engaged by these grievances. Electricians were referred to the work, there were legitimate requests made to the Union hiring hall under the GPMA, dues and remittances were paid, the terms of the GPMA were followed. The Union's and the ECAO's theory of no estoppel applying against a statutory right assumes that the statutory right is a defence against some mischief. There is none here.

96. Accordingly, we are of the view that, if the elements of an estoppel establish an undertaking to suspend the exercise of certain rights under a provincial agreement in the construction industry, absent compelling public policy considerations, the Board may uphold the estoppel and apply the equitable doctrine. We are bolstered in this view by the Court's decisions in *Bucyrus Blades of Canada Ltd. v. McKinley* and *Better Beef Ltd. v. MacLean*, above.

Was there an estoppel in this case?

97. The Board said this of estoppel in *Mechanical Contractors Association of Ontario*, [1986] OLRB Rep. June 768, at ¶28:

> The principle of estoppel, at least in its traditional form, is based upon the equitable notion that a person should not be allowed to insist upon his strict legal rights when he has so conducted himself that, having regard to all the circumstances, it would be unjust or unconscionable to allow him to do so.

98. The elements of an estoppel are the following: an unequivocal representation or promise clearly communicated (by word, action or silence) by a party knowing its rights, intended to affect legal relations, which is relied upon by the party to whom the representation is made, that a particular right or rights will not be enforced; and that promise is relied upon to its detriment by the party receiving the representation (*Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640, at ¶¶23-24).

99. In this case, if the representation were made, the Company is able to establish the detrimental effect of applying the GPMA. The detriment is the following. Besides the financial loss the Company will suffer if the grievances are upheld and it must pay the difference between the ICI and GPMA rates, the Company's reputation with Petro-Canada, an important client, has been harmed as a consequence of what the Company believed to be the Union's representation that the work on the BMS/ESD and CMP projects could be done under the GPMA.

100. Petro-Canada reached its own conclusion that the work it intended to do on the two projects was maintenance, and not ICI (new construction) work. This was because it saw no increase to the through-put of the production, no increase in the capacity of the white oils plant. What changed was the safety of the process. Petro-Canada approached Jacobs Catalytic to perform the work. Jacobs Catalytic held discussions with the various trades and informed Petro-Canada that it had viewed the scope of the work with the trades and it had their agreement that the work would be done maintenance, under the GPMA. The contractual arrangements between Petro-Canada and Jacobs Catalytic were therefore made on the understanding that the work was to be maintenance, not ICI, work. Jacobs Catalytic was paid on this basis. The work on both the BMS/ESD and the CMP was done maintenance by all of the trades, without complaint other than from the Union. In these circumstances, the prejudice or detriment to Jacobs Catalytic occasioned by the filing of the grievances, is having to try to re-negotiate a fresh arrangement with Petro-Canada, late in the day. Having to approach Petro-Canada for some variation of their contractual arrangement would necessarily adversely affect their relationship. Petro-Canada is an important client for the Company. Petro-Canada had come to trust its word on the arrangements it had reached with the various trades. The company's credibility and reputation as an organization was therefore adversely affected by the Union's endeavour, through these grievances, to claim damages. Should Petro-Canada be unwilling to alter the contractual arrangement with the Company, then the Company would itself have to carry the loss of its under-estimation of the cost of performing the work under the GPMA, rather than under the provincial ICI agreement.

101. The Union argues that, if the Company can establish detriment, it cannot establish reliance by the Company on Mr. Commandant's representation. Union counsel suggests that the Company would have gone ahead under the GPMA, notwithstanding any representation from Mr. Commandant. Counsel contends that Mr. Scott had a settled intention to perform the two projects under the GPMA, and the decision to act on that intention was not reliant on what Mr. Commandant said to him.

102. There is some substance to this argument. Mr. Scott was, no doubt, single-minded in his desire to perform the work under the GPMA rather than under the various provincial ICI agreements of the different trades. He did, though, take the precaution of clearing this intention with all of the trades, including the Union in the person of Mr. Commandant. So, it is speculative as to whether the Company would have proceeded with the projects under the GPMA had Mr. Commandant not given his consent. We cannot know. From the evidence we have, Mr. Scott wanted Mr. Commandant's imprimatur for the projects before they were underway, and he conveyed to Petro-Canada that he had the consent of the trades once he had secured Mr. Commandant's consent. The contractual arrangements with Petro-Canada were confirmed only after the Company had obtained Mr. Commandant's consent. We therefore conclude that Mr. Scott and the Company relied upon Mr. Commandant's representation in deciding to do the work under the GPMA. The Company went ahead with the work as maintenance secure in the knowledge that it had the Union's agreement.

103. The prior question, though, is whether a representation was made by Mr. Commandant to Mr. Scott that the work would be done under the GPMA sufficient to invoke the estoppel. Mr. Commandant's own actions until the union meeting on August 11 support this. He took no steps to challenge the work under the GPMA because, as we have found, he had reconciled himself to the fact that the work was to be done as maintenance, and not new construction. Almost on a daily basis, the requests for electricians made by Jacobs Catalytic to the

Union hiring hall contained the stipulation, "maintenance working under the GPMA", and the assignment of electricians by the Union and their hiring by the Company were done on this basis. The ongoing action of the Union in making the referrals supports the impression created that the work was to be done under the GMPA.

104. To determine if there was a representation made by Mr. Commandant sufficient to establish the estoppel, we must look at what we know of the communications between Mr. Commandant and Mr. Scott. Mr. Commandant conceded that the work on both projects would be done as maintenance. He conveyed that the Company could proceed to have the work done under the GPMA. We find that Mr. Scott relied upon Mr. Commandant's representation. On the strength of his representation, Mr. Scott advised Petro-Canada that he had the consent of all of the trades that the work would be done as maintenance, and not as construction. From then on the Company was locked into a particular rate with Petro-Canada for the work it had contracted to do.

105. We have found that Mr. Commandant did not intend to take any action against the Company to assert a violation of the ICI agreement. He thought the work would be done under the GPMA, and he had accepted this. This was manifested in his failure to take any steps to alter the impression he had created, that the work was to be done under the GPMA, and not under the Principal Agreement. The Union's acceptance of this arrangement was further confirmed by the daily practice of the Union referring electricians from its hiring hall to perform work expressly under the GPMA.

106. From this we conclude that Mr. Commandant so conducted himself in the meetings, and the Union took no action to the contrary for many months, so that, having regard to all the circumstances, particularly the consequences for the Company of its reliance on Mr. Commandant's representations, it would be unjust or unconscionable to allow the Union to enforce the strict terms of the Principal Agreement.

107. We find therefore that the elements of an estoppel have been proved by the Company and that the Union may not rely upon its rights under the Principal Agreement to seek damages for the portions of the work on the BMS/ESD and CMP projects which were construction, and not maintenance.

The late filing of the grievances

108. Given the conclusion we have reached on the Company's estoppel defence, it is not necessary for us to decide on the timeliness of the grievances.

Summary of conclusions

109. For the reasons stated, we find that some of the electrical work on the BMS/ESD and CMP projects was maintenance, and some of it was construction, as described. However, the Union is estopped from asserting rights under the provincial ICI agreement with respect to the BMS/ESD and CMP projects. It is therefore not entitled to any damages. The grievances are accordingly dismissed.

PARTIAL DISSENT OF BOARD MEMBER ALAN HAWARD; November 29, 2007

1. For the most part I am in agreement with my colleagues in this decision. Where we differ is in the delineation of Construction Work vs. Maintenance.

2. The two projects in question The Burner Management and Emergency Shutdown System (BMS/ESD) and the Chloride Mitigation Project (CMP) were in my opinion major modifications to the two systems. Each of the tasks that my colleagues have said were maintenance were in fact designed and planned parts of these two systems, and in my opinion construction work.

3. In other circumstances I could agree that the tasks defined as maintenance were in fact maintenance. For example, the installation of new flame scanners could very well be maintenance if they were installed as part of an outage and they needed to be replaced or while doing some other project. They would then be changed out because it made sense at that time. That, however, is not the case in this instance. The whole BMS/ESD was modified and these scanners were a designed part of that modification.

4. I would have defined all of the work on both the BMS/ESD and CMP projects as construction work.

1623-06-ES Giuseppe F. Tedesco, Applicant v. **Joe Bone's Grill Inc.** and Director of Employment Standards, Responding Parties

Employment Standards – Reconsideration – Timeliness – The employer sought reconsideration of a Board order requiring it to pay the employee $10,000 in unpaid wages – Prior to the original hearing, the employer advised the Board that it was insolvent but it did not attend the hearing or present proof of insolvency – On reconsideration, the employer argued that it did not attend the hearing because of "off the record" advice it had received from the LRO – The Board found that even if the LRO had provided unofficial and erroneous advice, the employer had received the Board's Information Bulletin No. 24 and a Notice of Hearing with information regarding hearing attendance (and the consequences of non-attendance) – The Board also found that any representations by the LRO would have been ambiguous or unqualified to engage legitimate expectations – In addition, the Board held that the Request for Reconsideration was untimely as it was filed more than 70 days after the release of the decision – Ignorance of the Board's procedure is not a compelling reason for delay – Request for reconsideration dismissed

BEFORE: *Mary Anne McKellar*, Vice-Chair.

DECISION OF THE BOARD; November 6, 2007

Introduction

1. This decision deals with a request for reconsideration of my decision(s) disposing of an application for review under section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act").

Background

2. The application for review was brought by an employee ("Tedesco") of the responding party employer ("Joe Bone's"). I held a hearing on June 28, 2007 in Windsor. Only Tedesco attended. I heard his evidence and submissions and subsequently issued my decision and reasons in writing on July 4, 2007 ("the Decision on the Merits"). I directed Joe Bone's to pay $10,000.00 to Tedesco in respect of unpaid wages.

3. The Decision on the Merits refers to the fact that the Board received correspondence just prior to the hearing setting out that Joe Bone's was insolvent:

> 2. I convened a hearing into this matter on June 28, 2007. No representative of the Employer attended the hearing. Previously, correspondence had been sent to the Board indicating that the Employer is insolvent, but there was no proof of that presented, nor was there any suggestion that a trustee in bankruptcy had been appointed. Consequently, while it may be that any amounts awarded against the Employer may not be recoverable, I was satisfied that there was no legal impediment to my proceeding to hear the case.

4. Subsequent to the hearing, the Board received further correspondence dated August 2, 2007, reiterating that Joe Bone's was insolvent. On August 29, 2007, a representative of Joe Bone's wrote to the Board and advised that no one from the employer had attended the hearing because of "off the record" advice received from the Labour Relations Officer ("LRO"), and requested a stay of the Decision on the Merits. I wrote a further decision dated September 7, 2007 in response to this correspondence in which I denied the request for a stay ("the Second Decision"). Shortly thereafter, on September 11, 2007, Joe Bone's representative wrote directly to me, and expressed outrage at the Second Decision and the fact that I had not called her to discuss it. This correspondence was handed over to a Board solicitor, who answered it in writing on September 27, 2007, and provided the appropriate form on which to make a request for reconsideration. This request was then filed with the Board on October 15, 2007.

Basis for the Request for Reconsideration

5. The Request for Reconsideration was filed by counsel retained by Joe Bone's in early October 2007. Prior to that Joe Bone's had not retained counsel to represent it in any of its dealings with the Board.

6. The Request for Reconsideration asserts again that the LRO advised Joe Bone's representative in these proceedings (and its sole director) "off the record" on two occasions not to attend the hearing. It appears that this alleged recommendation was understood to relate to the company's insolvency. On one of these occasions it is asserted that the director was advised that the claim before the Board was against the company only and would not expose her personally to

any liability if she did not attend. It is submitted that Joe Bone's did not attend the hearing as a result of an "officially induced error".

7. With respect to the merits of the case, it is asserted in the Request for Reconsideration that Tedesco was not entitled to any wages despite the fact that Joe Bone's ceased paying him his agreed-upon salary in January 2005. Although he performed some work for Joe Bone's after that time, it appears to be asserted that he did so on a part-time (rather than full-time) basis and that he agreed not to be paid for his work because he also had some ownership interest in the business. It is also asserted that Joe Bone's again agreed to pay Tedesco a full-time salary commencing in June 2005 and that he worked full-time until the restaurant ceased doing business in August 2005. On the basis of these factual assertions, it is submitted that Joe Bone's did not owe any wages to Tedesco.

8. While the Request for Reconsideration also contains some assertions about the nature of Tedesco's financial investment in Joe Bone's and certain self-help measures he took in respect of that which were coincident with and may have precipitated the restaurant's closure, I do not understand counsel to be relying on these assertions in support of any contention that I should set-off wages owing against the amounts gained by these alleged self-help measures. I understand counsel's contention to be that Tedesco was not an employee during the period of time for which I found he was owed wages (January 2005 to June 2005).

9. Joe Bone's has requested that I reconsider the Decision on the Merits and hold another hearing. Alternatively, it has asked that I reconsider my decision not to stay the Decision on the Merits pending the outcome of its complaint to the Ombudsman. In the final alternative, it has asked that I stay the enforcement of the Decision on the Merits against any director of Joe Bone's pending the outcome of the complaint to the Ombudsman and a civil action that has been commenced against Tedesco.

Reconsideration Power

10. The Board's decisions are intended to be final. While the Board possesses the discretion to reconsider its decisions, it does so only in exceptional circumstances. While such exceptional circumstances would include those where the Board failed to provide an interested party with notice of a hearing, they would not normally include circumstances where a party who received notice of a hearing simply failed to attend.

11. The Board's Rules of Procedure require that requests for reconsideration be made within 20 days of the release date of the decision in respect of which reconsideration is sought.

Analysis

12. Joe Bone's contention in this case, of course, is that it did not "simply fail to attend" the hearing, but that it was advised by the LRO not to attend, and its director was also advised the hearing could expose her to no liability. This advice was characterized as having been made "off the record".

13. All of Joe Bone's assertions are, of course, unproven. For the purposes of this decision, however, I am prepared to assume that they are true.

14. When the Board processed this application, it sent the following materials to Joe Bone's: (1) a copy of the application; (2) a Confirmation of Filing of the application, which advised that a LRO had been appointed to meet with the parties and "endeavour to effect a settlement"; and (3) a copy of the Board's Information Bulletin No. 24, which expressly notes that the LRO's role is not to provide legal advice to any party and also warns of the consequences of failing to attend a hearing.

15. The conversations that are alleged to have occurred with the LRO occurred prior to and at the meeting that he convened. That meeting was held on February 13, 2007. By Notice of Hearing dated March 23, 2007, this matter was scheduled to be heard on June 28, 2007. That Notice of Hearing reiterated the warning earlier communicated to the parties about the consequences of failing to attend a hearing, namely, that the Board may decide the case in that party's absence and without considering anything that party has filed.

16. In this case, two official communications of the Board (the Confirmation of Filing and the Notice of Hearing) warned that there could be consequences to a party that failed to attend a hearing. In addition, two official communications (the Confirmation of Filing and Interpretation Bulletin No. 24) described the role of the LRO as being to assist the parties in settling the matter, and one of those expressly noted that LROs do not give legal advice to parties. Finally, even on Joe Bone's own assertions, what the LRO said in the two conversations was expressed to be "off the record".

17. While it is regrettable if Joe Bone's, acting without the benefit of legal counsel at the time, failed to attend the hearing only because of what it understood the LRO to have allegedly recommended, I do not think on the facts of this case that that can be construed as an "officially induced error". In the first place, my understanding of this doctrine is that it may be used as a defence to a prosecution:

> There is a recognized defence of officially induced error. It is available in criminal prosecutions: See *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510. It is also a potential defence of an accused charged with violating a regulatory statute: see *Cancoil Thermal Corp. and Parkinson* (1986), 11 C.C.E.L. 219, 27 C.C.C. (3d) 295 (Ont. C.A.).
>
> *Maitland Valley Conservation Authority v. Cranbrook Swine Inc.* (2003), 64 O.R. (3d) 417 (C.A.), at pp. 430-31, per MacPherson, JA.

18. Applications for review under section 116 of the Act are not prosecutions: they are the final adjudicative step in the determination of civil disputes between employers and employees respecting the latters' entitlements under the Act. Officially induced error is available as a defence where a number of elements are met, but in essence it requires an individual charged with an offence in respect of certain actions to have sought advice with respect to the legality of those proposed actions before they were undertaken and to have been assured that they were legal. Further, the individual's reliance on that advice must have been reasonable. I do not understand Joe Bone's to have asked the LRO if it would be illegal for her not to attend the hearing. Indeed, it was not illegal for her not to have attended. In any event, it is difficult to see how reliance on the LRO's "off the record" advice could be considered reasonable when all of the "on the record" communications from the Board stressed to parties that LROs were not in the business of advising parties and when those communications also emphasized the importance of attending

hearings in which one is a named party. Indeed, even after all communications with the LRO had occurred, the Notice of Hearing from the Registrar contained such warning in upper case bold print.

19. While I do not think, for the reasons articulated above, that the concept of "officially induced error" has any application to a civil proceeding such as a section 116 application under the Act, and I also do not think the facts here permit Joe Bone's to rely on it in any event, I have also considered whether the advice attributed to the LRO could have raised any legitimate expectation in Joe Bone's with respect to what would occur if it did not attend the hearing. The doctrine of legitimate expectations does apply in civil proceedings. Generally speaking, it holds that where a government official provides a person with "clear unambiguous and unqualified" advice about how a matter will be processed, fairness may demand that that process be the one that is followed. The principle of legitimate expectations relates only to procedural matters, it cannot be relied on to ensure a particular outcome. For reasons set out in the following paragraph, I have concluded that this doctrine also does not apply in the circumstances of this case.

20. LROs do not decide cases. Their role is to mediate disputes. Only a properly-constituted panel of the Board can determine the merits of an application, and LROs cannot constrain a panel's exercise of this function. This is clearly set out in Interpretation Bulletin No. 24. Furthermore, the LRO in this case, assuming as I have that he made the comments that Joe Bone's has attributed to him, cannot be said to have made a "clear unambiguous and unqualified statement" about what would occur at the hearing of this section 116 application. Each of these criteria must be present. See *Libbey Canada Inc. v. Ontario (Ministry of Labour)* (1999), 42 O.R. (3d) 417 (C.A.). In the first place, it is not even alleged that he made representations about the conduct of the hearing. Rather, it is merely asserted that he told Joe Bone's not to attend, and Joe Bone's appears to have inferred from that that there would be no consequences to it should it follow that advice, although that does not appear to have been clearly stated. In other words, the alleged representation may not have been sufficiently "clear" to engage any legitimate expectations on Joe Bone's part. As well, it is difficult to describe the communication as "unambiguous" when all of the Board's official communications warn of the consequences of not attending a hearing. Finally, the fact that the communication was made "off the record" clearly makes it "qualified" as opposed to "unqualified" advice. For all of these reasons, I have determined that Joe Bone's had no basis for a legitimate expectation that it could not be disadvantaged by failing to attend a hearing, even if the doctrine of legitimate expectations applied to the outcome of adjudicative proceedings as opposed to the conduct of them.

21. From an institutional perspective there are difficulties with allowing a party to assert that he or she had a legitimate expectation that a matter would be handled in a particular way based solely on a conversation with an LRO, or that he or she conducted himself/herself in a particular way that turned out to be disadvantageous because of something the LRO said. LROs are mandated by the Act to meet with parties and attempt to settle matters. This role can only be carried out effectively where there is an assurance that settlement discussions are confidential and "off the record". In recognition of this, the Act (like the *Labour Relations Act, 1995*) provides that LROs are not compellable witnesses in any proceeding without the consent of the Board. While I have proceeded in this decision on the basis that Joe Bone's assertions are true, the fact is that they are mere assertions, and were I inclined to act on them it would be necessary to test their

validity through hearing *viva voce* evidence about the very meetings whose efficacy in settling disputes depends on the protection of their confidentiality.

22. The other problem with this Request for Reconsideration is that it has not been filed within the timeframe mandated by the Board's Rules of Procedure – 20 days after the release of the decision it seeks to have reconsidered. Instead, it has been filed just more than 70 days after the release of that decision. I think it is appropriate to take this into account when I am being asked to exercise a discretion that is reserved for exceptional circumstances because the Board's decisions are otherwise intended to be final. In my view, the reasons for the delay are not very compelling. Joe Bone's knew about the impact of the Decision on the Merits very shortly after it was issued. Despite the fact that the Decision on the Merits referred to the Board having been informed of the alleged insolvency of Joe Bone's, all Joe Bone's did in response to the decision initially was to write to the Board reiterating that assertion. Later it asked the Board to stay the Decision on the Merits, and my Second Decision dealing with that request referred to the Board's reconsideration power. Still Joe Bone's did not file a request for reconsideration until almost 6 more weeks had passed.

23. Finally, it is not clear to me that the evidence Joe Bone's says it would have adduced had it attended the hearing would have meaningfully altered the outcome of this proceeding. If Tedesco was working at Joe Bone's he would be an employee under the Act, regardless of whether he also held an ownership interest. Indeed, that is how he was treated at least initially. As an employee, he could not agree to work for less than the minimum wage between January 2005 and June 2005. See section 5(1) of the Act. Although Joe Bone's asserts that it agreed to pay him at the rate of $40,000.00 per annum full time from June 2005 on, it makes no assertion that he actually was paid any wages for July and August. Wages he would have earned at the $40,000.00 per annum rate during those two months plus wages he should have been paid during the preceding 5 months (even calculated at minimum wage) would in all likelihood have exceeded the maximum Order to Pay that could be made under the Act ($10,000). That is in fact what I ordered Joe Bone's to pay. Although Joe Bone's evidence and submissions may have influenced me in finding that the global sum of wages owing to Tedesco may have been less than I calculated, that sum could still have been in excess of $10,000.00 and might have resulted in my issuing the same Order to Pay.

Conclusion

24. This request for reconsideration has been made well outside the time limits contemplated in the Board's Rules of Procedure. The explanation for a delay of this magnitude is not very compelling as it comes down to ignorance of the Board's process, and this is illustrated most clearly by the attempts of Joe Bone's representative to communicate directly with me after the Second Decision issued. The delay alone could constitute sufficient grounds for declining this request.

25. As set out above, Joe Bone's essentially asserts that it was the Board's (LRO's) fault that it did not attend the hearing, and that if it had attended the outcome would have been different. For its request for reconsideration to be successful and result in a new hearing I must find that both these assertions are persuasive. With respect to the first, for reasons set out above, I find that reconsideration is not appropriate where a party failing to attend a hearing of which it had formal and official notice and where it had been warned (repeatedly) of the consequences of

not attending relies on a private "off the record" conversation with an LRO where the Board's official communications made clear that the LRO is not in a position to offer legal advice to parties. That determination alone would also constitute sufficient grounds for declining this request.

26. Finally, it is not obvious to me from the facts asserted in the Request for Reconsideration that the evidence Joe Bone's would have led at the hearing could have resulted in a different outcome.

Disposition

27. This request for reconsideration is dismissed.

4166-06-ES Tanya Phillips, Applicant v. **Linis Sales Inc. o/a Canadian Tire** and Director of Employment Standards, Responding Parties

Employment Standards – The employee appealed a decision of an employment standards officer not to award her termination pay and the amount of her last pay cheque - The Board found that the employee, a teenager working her first job, had wrongly entered a customer's bill payment but the conduct did not amount to wilful or deliberate misbehaviour to disentitle her to termination pay – The Board further found that the employer caused or coerced the employee to sign over her final pay cheque to it, constituting an unlawful deduction contrary to the Act – However, the Board found that the forty dollars cash the employer asked the employee to hand over from her wallet (under threat of legal action) during the termination meeting was not wages, accordingly, the Board was without jurisdiction to order the return of these funds – Application allowed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Tanya Phillips* and *Sherri Phillips* for the applicant; *Caroline Pustowka* for the responding party employer; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD; November 15, 2007

1. This is an application for review by an employee of the decision by an Employment Standards Officer not to issue an Order to Pay against her former employer, the corporate responding party.

2. The Board held a hearing in Ottawa to receive the evidence and argument of the parties.

3. The applicant claims that she is owed termination pay and the amount of her last pay cheque. The facts are not substantially in dispute.

4. The applicant was employed at the corporate responding party's Canadian Tire Store as a part-time cashier. She earned eight dollars per hour. She was sixteen years old at the time of the events which give rise to this application.

5. The incident which led to the termination of the applicant's employment occurred on July 24, 2006. A regular customer came into the store and paid the balance of his Canadian Tire credit card. He paid one thousand dollars cash. Unfortunately, the applicant punched the amount of two thousand dollars into the cash register and she gave the customer a receipt for that amount.

6. The error was discovered on reconciliation at the end of the day. The mistake was confirmed when the employer reviewed its surveillance video tapes.

7. The employer spoke to the customer who took the position that he had paid two thousand dollars as the receipt indicated. The employer knows this is not true.

8. The applicant was on vacation at the time the employer's investigation was going on. On her return, she was called into a meeting and her employment was terminated.

9. At the meeting, the employer gave a cheque to the applicant for her last pay and the employer said it might take "legal action" against her. The employer asked the applicant to sign back the cheque to it and she did so. The applicant was not given an opportunity to call her mother, although there was no suggestion she asked to do so. Normally, the applicant was paid by direct deposit. It appears, therefore, that the reason the employer paid the applicant with a cheque was for the purposes of having it signed back.

10. In addition, the representative of the employer requested that the applicant give it any money that she had on hand. In response to the request, the applicant took forty dollars out of her purse and gave it to the employer.

11. There was some suggestion that the employer initially suspected the applicant of improper behaviour in the transaction with the customer. However, that was cleared up prior to the hearing. The employer advised me that it does not accuse the applicant of wrongdoing, just gross negligence.

12. At or after the commencement of her employment with the store, the applicant signed a document titled "Store Security Regulations", one of the provisions of this states: "to accept responsibility for any cash or company shortages, which occur while same, are solely under my control".

Decision

13. At the hearing of this matter I advised the parties that in my view the employer's claim that it did not owe termination pay to the applicant could not succeed. In this regard section 2(1)3 of Regulation 288/01 to the Act states:

> **2.** (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

> 3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

14. The employer gave evidence that it had in place a policy which stated as follows:

> Cash & Customer Care Meeting
>
> May 7 2006
>
> Signing any and all documentation handed out at this meeting means that you both understand and will follow through with all CTC policies and procedures.
>
> Failing to do so will lead to (1) a conversation, (2) a verbal warning, (3) formal written warning that will go in your file.
>
> At that point if you do not follow policy it may lead to your termination with Canadian Tire 272.
>
> We hope that does not happen and we all can continue our relationship.
>
> Kindest regards,
> CTC 272 Management
>
> ("Tanya Phillips")

15. While the employer claims to have given the applicant oral disciplinary warnings on occasions prior to the termination of her employment, there is no dispute that the applicant did not receive a formal written warning prior to this incident. Moreover, there is also no dispute that the applicant made a mistake – an expensive mistake – but a mistake none the less. Since the applicant's conduct was not deliberate, I am satisfied that the applicant did not engage in "wilful" misconduct or "wilful" neglect of duty as the Regulation requires as a defence to termination pay. Moreover, the employer's own progressive discipline policy was not followed. Therefore, termination pay was clearly owing.

16. The issue of whether the applicant has a claim to her final pay cheque and the forty dollars which she provided the employer from her purse is more difficult. Section 13 of the Act states:

> **13.** (1) An employer shall not withhold wages payable to an employee, make a deduction from an employee's wages or cause the employee to return his or her wages to the employer unless authorized to do so under this section.
>
> (2) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them if a statute of Ontario or Canada or a court order authorizes it.

> (3) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them with the employee's written authorization.
>
> (4) Subsections (2) and (3) do not apply if the statute, order or written authorization from the employee requires the employer to remit the withheld or deducted wages to a third person and the employer fails to do so.
>
> (5) Subsection (3) does not apply if,
>
> (a) the employee's authorization does not refer to a specific amount or provide a formula from which a specific amount may be calculated;
>
> (b) the employee's wages were withheld, deducted or required to be returned,
>
> > (i) because of faulty work,
> >
> > (ii) because the employer had a cash shortage, lost property or had property stolen and a person other than the employee had access to the cash or property, or
> >
> > (iii) under any prescribed conditions; or
>
> (c) the employee's wages were required to be returned and those wages were the subject of an order under this Act.

17. The first issue regarding the applicability of s. 13 is whether the employer in this case "caused" the employee to return her wages. The second issue is, if the employer did cause the employee to return wages, was it authorized to do so pursuant to s. 13(3) and (5) of the Act.

18. I am satisfied that under the circumstances of this case the employer "caused" the applicant to return her wages to it. The Act is remedial legislation. It must, under our law, be given a broad and liberal interpretation. It exists for the protection of employees. The employer confronted a young woman and asked her to return her pay cheque and not surprisingly, given her age, and the circumstances including the implied or explicit threat that she had engaged in wrongdoing and that the employer would engage in legal action, she agreed to the request. If this is not "causing" an employee to return her wages it is difficult to imagine what is.

19. That leaves the question of whether any of the provisions which permit an employer to cause wages to be returned are present in this case. The only exception which could apply is the "written authorization" provision of s. 13(3). The employer asserts that either its Store Security Regulation signed by the employee or the applicant's signature on the back of the cheque constitutes written authorization for the deduction.

20. It is to be noted, that s. 13(3), which allows an employer to make deductions from an employee's wages, is subject to s. 13(5). In this regard, s. 13(5)(a) requires that a written authorization refer to a specific amount or formula. The provision in the Store Security Regulation clearly does not comply with that condition. A statement, as exists here, that the

employee will be "responsible" for cash shortages is therefore not a proper written authorization for deduction pursuant to s. 13 (3) of the Act.

21. As for the cheque constituting written authorization, there is no suggestion that anyone other than the applicant had access to the cash. Indeed, the applicant takes responsibility for the cash shortage. Moreover, if the signed letter of authorization is the cheque itself, then the authorization refers to a specific amount (i.e the amount of the cheque). Since none of the other exceptions contained in s. 13(5) could apply, it would appear that s. 13(5) does not act as a bar to the employer's position.

22. The real issue with respect to the cheque constituting written authorization is coercion. As noted, the Act is legislation which is designed to protect employees. Specifically, s. 13 of the Act is designed to protect employees from an employer making deductions from an employee's wages except in narrow circumstances, particularly where the wages are being intended to cover cash shortages. The Act contemplates that deductions from wages can be made where there is an agreement to do so, freely entered into. Agreements entered into as a result of coercion will not be enforced (see *Malamas* [1990] O.E.S.A.D. No. 47 (April 16, 1990).

23. In this case the applicant was young at the time of the incident. She had just been fired and the company advised her that it would take legal action against her if she did not sign over her final pay cheque. Not surprisingly, she complied. Even assuming that such an agreement is the type of written agreement contemplated by the Act – the agreement was not freely entered into and this does not constitute written authorization under the Act.

24. As for the $40.00 from her purse, I am unable to find that the request that such monies be paid constitutes the causing of wages to be returned.

25. There is no dispute that if the applicant is found to be owed her final pay and termination pay that it amounts to $661.35.

Decision

26. For all of the foregoing reasons, I order the employer to forthwith pay $661.35 to the Director of Employment Standards on behalf of the applicant. If the money is not paid in 30 calendar days, an administrative fee of $100.00 shall be added to the Order.

1224-07-R International Union of Painters and Allied Trades, Local 1891, Applicant v. **Melandi Drywall System Inc.**, Responding Party

Certification – Construction Industry – Employee – Practice and Procedure – Status – The employer sought to remove two names from its list of employees at the Regional Certification meeting for one of two proffered reasons: either because they were performing work of a different craft or they were independent contractors – The Board refused to allow the employer to alter its list – The prejudice to the union in having to attempt to ascertain what work the employees were doing on an ordinary day two months earlier was significant and perhaps impossible to overcome – Secondly, the facts pleaded by

the employer to establish independent contractor status were equivocal and therefore also prejudicial – Motion dismissed – Matter continues

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Bernard Fishbein, Greg Smith* and *John McNee* for the applicant; *Mark Stone* and *David Walker* for the responding party.

DECISION OF THE BOARD; November 27, 2007

1. This is an application for certification brought pursuant to the construction industry provisions, and in particular section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, Ch. 1, as amended (the "Act"). This decision deals with a preliminary matter that was argued before the case began. It represents a fuller version of the reasons given for the decision at that time.

The Issue

2. The application was filed on July 4, 2007. The employer's response was due and was filed on July 9, 2007. At that time it included a list of 13 names, all of whom were described as "tapers". The Regional Certification Meeting was held on September 5, 2007. At that time the employer sought to amend the list to delete the reference to two persons, Pedro Frere and Antonio Modeira Jr. It asserted that these persons were not in the bargaining unit because they were (1) performing the work of carpenters on the application date (installing studs and drywall board) and (2) were independent contractors. Counsel advised that the first point was, for the Employer, the "major" issue.

3. In support of the first proposition, the employer asserted that the error was simple miscommunication. The Employer had sent to counsel a list of the persons performing work for it, and a student in counsel's office added the work "taper" beside each one. It was only in preparation for the regional Certification Meeting that the error was discovered.

4. In respect of the proposition that these persons were independent contractors, the Employer relied on the following assertions: the two persons had only recently come to work for the Employer, in contrast to those employees who had worked for it for many years. They worked for the employer only one day per week. The rest of the week they worked for another drywall contractor in a bargaining unit of carpenters represented by a local union of the United Brotherhood of Carpenters and Joiners of America.

5. The Union asserted that it was prejudiced by this change in position and that the Employer ought not to be permitted to make the changes it sought to the list. It relied on cases such as *Reid's Uptown Homes*, [2007] OLRB Rep. May/June 633 and cases that followed.

6. I disagree with the analysis of cases that the Union relied on. All of them deal with employers who fail to file a response within two days of receiving the application as they were required to do by subsection 128.1(3). These cases deal with the exercise of the Board's discretion in the face of a failure to comply with a mandatory statutory scheme. In this case, the Board is simply being asked to permit the Employer to raise two new issues in a case that has been proceeding in an orderly fashion as an exercise of its discretion to conduct its own process.

Nothing in the *Reids Uptown Homes* cases changes the general propositions contained in cases such as *Martha's Garden*, [1997] OLRB Rep. Sept./Oct. 891 or the manner in which the Board has exercised its discretion under section 8.

7. Having said that, this is an application under the construction industry provisions of the Act, and the labour relations reality is the same as was described in *Reids Uptown Homes Ltd., supra*. The Employer's reasons for asking the Board to permit it to raise these new issues, inadvertence and a failure to understand the precise nature of the information required by the Board, is not a particularly compelling one, although it does eliminate any suggestion of bad faith or dishonest behaviour. This is not a question of a failure to meet the time set by the Act for the filing of a response, but rather it involves a consideration of the Board's more general discretion. It is, therefore, sufficient to permit the Board to go on to consider the issue of prejudice to the Union.

The work performed

8. There is prejudice to the Union in being required to deal with this issue two months after the application was filed. It is not, as counsel for the Union suggests, a prejudice that arises from not being required to keep track of these individuals after the response was filed. Once the response was filed and the Union knew there would be litigation, it should have kept track of all witnesses and potential witnesses.

9. The considerable difficulty the Union faces is the ability on and after September 5, 2007 to obtain evidence about what these two individuals were doing on the application date. As the Board said in *Reids Uptown Homes, supra*, work on many construction sites is repetitive. One day will not stand out particularly from another. The Union's best hope of identifying and gathering evidence occurs immediately after the response is received. September 5, 2007 was two months after the application was filed.

10. The two individuals themselves will be unlikely to remember the day. There was no need to make a particular note of that day and to remember in detail what each was doing that day. They may remember it as the day the application was brought or the day a union organizer visited, if they were aware of it on the application date.

11. The Union organizer who brought the application will not be prejudiced. He or she should have been keeping careful track of who was doing what on the application date and to have prepared himself or herself for the eventuality of testifying about those observations.

12. The ability of other employees who might have seen the two individuals working on the application date will be close to nil. At the best of times it will be difficult to remember what one did one's self. To remember what others (who were, as far as we know, doing nothing remarkable) on an ordinary working day in the middle of the week two months earlier is almost impossible. The Union has lost the opportunity of contacting such potential witnesses soon after the application date and ascertaining whether they have any recollection of the important facts at a period of time when there is some hope that they might remember.

13. The prejudice to the Union in this case is very considerable and in some cases impossible to overcome. Evidence that is crucial to its case is no longer available to it. The

prejudice is sufficiently severe that I to refuse to permit the Employer to raise a challenge to the presence of these two individuals on the list of employees on the basis that they were not performing bargaining unit work on the application date.

The independent / dependent contractor issue

14. The question of the independent / dependent contractor issue is different. The date of application is not crucial at all to the argument, and the ability of the Union to obtain evidence is not as severely impaired, although no evidence improves with the passage of time. To introduce the issue would lengthen the proceedings and introduce an issue that would require considerably detailed evidence from non-parties who are not likely to be particularly motivated to produce it (e.g. income tax returns etc.).

15. The definition of a dependent contractor is found in section 1(1):

> "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

That is, there is a comparison between the relationship of the person in question and the relationship of employees in the same industry generally, or between the persons in question and any specific comparators in particular.

16. As noted, counsel for the employer raised a number of factual assertions about these individuals and why they were independent contractors in his argument. In the written notice of this new position, the Employer pled only that: "These individuals are independent contractors who work for many other employers." I make the following observations about the issues asserted by counsel in oral argument:

> (1) The Employer listed them as employees initially in its response.
>
> (2) Reviewing the material filed by the employer in respect of other persons who are agreed to be employees, I note that they too provide labour in exchange for money, and that payment depends on the quantity of work performed, not on the amount of time it took to perform that work.
>
> (3) The fact that they work one day a week for the Employer is not significant. It is quite common for persons employed in the construction industry to have a second source of income to rely on when their main source of income is irregular. There is no case of the Board that has ever held that the status of part-time employee and dependent contractor are mutually exclusive.

> (4) The fact that they began to work for the Employer only recently is not relevant at all. The reason the Board looks at the date of application to determine the list of employees in the bargaining unit is precisely because employment in the construction industry is for many, but by no means all persons, a matter of irregular patterns of employment and a large number of short-term jobs.

17. On this issue, while the prejudice to the Union is less, the Employer has not pleaded facts to cause the Board to exercise its discretion to permit it to raise this issue at this time. While the facts alleged by the employer are often features of an independent contractor relationship, they are found equally in many dependent contractor relationships. It might be enough to plead such facts initially to permit the matter to be perused in the course of this litigation. However, when an employer wishes to raise the issue and reverse a position it had specifically taken two months earlier, it is necessary to plead more significant details that point more strongly to the result desired than it has been able to do in this case.

18. Therefore I will not permit the Employer to raise either of these issues in this proceeding. Pedro Frere and Antonio Modeira Jr. are employees in the bargaining unit for the purposes of this application.

2539-06-R; 2648-06-U United Brotherhood of Carpenters and Joiners of America, Local 2486, Applicant v. **Pedersen Construction Inc.**, Responding Party; Pedersen Construction Inc., Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Responding Party

Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *Melissa Kronick* and *Gabriel Parent* appearing for the United Brotherhood of Carpenters and Joiners of America, Local 2486; *Michael S. Ruddy, Karl Pedersen* appearing for Pedersen Construction Inc.

DECISION OF THE BOARD; December 4, 2007

1. Board. File No. 2539-06-R is an application for certification which the applicant has elected to have dealt with under the provisions of section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 (the "Act"). The applicant is the United Brotherhood of Carpenters and Joiners of America Local 2486 (the "Union"). The responding party is Pedersen Construction Inc. (the "Company").

2. Board. File No 2648-06-U is an application filed under section 96 of the Act by the Company alleging that the Union has violated sections 5, 15, 70 and 76 of the Act. In addition, the Company relies upon the same particulars that it filed in this section 96 application in its response to the application for certification. Specifically, based on these particulars the Company requests that the Board exercise its discretion under section 128.1 of the Act and order a representation vote, rather than simply certifying the Union, even if the Board finds that the Union represents more than 55% of the employees at work in the bargaining unit on the date of application.

3. This decision concerns two matters, a preliminary motion, which itself has two parts, and a request for disclosure.

Issue #1 No *Prima Facie* Case Motion

4. The Company's allegations relate to the manner in which the Union's membership evidence was collected and the reliance which the Board should place on this evidence.

5. The Union takes the position that both the Company's application under section 96 of the Act and its request that the Board consider exercising its discretion to order a vote in this application for certification should be dismissed on a preliminary basis as the particulars on which the Company relies do not, on their face, disclose any violation of the relevant sections of the Act and do not provide even an arguable basis for the Board ordering a vote (assuming that the Union does in fact represent more than 55% of the employees in the bargaining unit on the date of application).

The Facts

6. The Company is a general contractor based in, and operating in and around, New Liskeard, Ontario.

7. On the date of application, November 15, 2006, certain of the Company's employees were performing work at the Temiskaming New City Hall job site in Haileybury, Ontario (the "City Hall" project). The general contractor for this project was Cy Rheault Construction, a company that is bound to the Carpenters' Provincial ICI Collective Agreement. Notwithstanding

its collective agreement obligations, Cy Rheault Construction entered into a sub-contract with the Company (which was not in contractual relations with the Union) to perform certain concrete forming work on the City Hall project.

8. It was this concrete forming work that the Company's employees were performing on the morning of November 15, 2006, when a representative of the Union, Mr. Gabriel Parent, arrived at the City Hall project. Mr. Parent was apparently introduced to Mr. Dan Little, a working foreman for the Company, by an employee of Cy Rheault. After a brief conversation, Mr. Parent went to speak to others on the job site and then returned to find Mr. Little. What happened next is a matter of significant dispute between the parties but given that this is a *prima facie* case motion it must be assumed that the "facts" relied upon by the Company are true. In this respect, paragraphs 5 to 11 (inclusive) of the amended Schedule "B" Company's responses state:

> 5. Shortly thereafter, Gabriel Parent returned by himself to this responding party's work site on this construction project and approached Dan Little. Mr. Parent told Mr. Little that he needed information from Pedersen Construction Inc.'s employees working on the site performing concrete forming duties under the permit allowing Pedersen Construction Inc. workers to work on this site. Mr. Parent told Dan Little that this information was required in order that the applicant could obtain fees from Cy Rheault Construction, which Mr. Little understood were to be monies remitted from Cy Rheault Construction to the applicant for the hours worked by Pedersen Construction Inc. employees on this project.
>
> 6. Gabriel Parent asked Mr. Little to sign an information sheet (pad form) which Mr. Little did. Mr. Parent then asked Mr. Little to have all of the information sheets filled out and signed by Pedersen Construction Inc. employees working at such site. In accordance with Mr. Parent's request, Mr. Little proceeded to have this responding party's employees Jerry Ridley, Chris Inglis, Jeff Dessureault and Dustin Curran complete and sign the information sheets in question. Mr. Little informed each employee that the information sheets that they were signing was for information only to allow Pedersen Construction Inc. workers to work for Cy Rheault Construction under the permit issued by the applicant. While Mr. Little attended to having all of the crew members complete and sign the information sheets, he was not accompanied by Gabriel Parent.
>
> 7. In the meantime, and while Mr. Little was attending to the completing of the information sheets, Charles Lachapelle, this responding party's other working foreman on site, who bad been introduced to Gabriel Parent by Mr. Little prior to tending to the completion and execution of the information sheets in question, engaged in conversation. Mr. Lachapelle was advised by Mr. Parent that he had requested Mr. Little to obtain the information from the company's workers for permit purposes only allowing this responding party to work for Cy Rheault Construction at this union project.
>
> 8. Gabriel Parent asked Charles Lachapelle to complete and sign an information sheet as well. Mr. Lachapelle refused such request.

> Gabriel Parent told Mr. Lachapelle that he would be leaving the new city hall project site and proceeding to this responding party's main office to speak with Karl Pedersen, the President. Parent asked for Mr. Lachapelle's name and Lachapelle obliged him. Mr. Parent gave Mr, Lachapelle his business card.
>
> 9. Charles Lachapelle and Gabriel Parent walked over to Dan Little at which time Mr. Parent took back the information sheets (pad form) from Mr. Little. Mr. Parent then left the site in question.
>
> 10. Mr. Lachapelle then asked this responding party's employees what they had signed and he was told that to their understanding, the employees had signed information sheets.
>
> 11. Thereafter, Charles Lachapelle, feeling something amiss, telephoned Gabriel Parent and asked what the Pedersen Construction Inc. workers had signed earlier that day. Mr. Parent advised Mr. Lachapelle that such workers had signed membership cards and laughed over the phone at Mr. Lachapelle. Such telephone conversation was immediately discontinued.

9. It is based on these alleged facts that the Company asserts that the Union has violated sections 5, 15, 70 and 76 of the Act and takes the position that even if the Union has achieved the necessary threshold to be certified without a representation vote the Board should nevertheless order one to be held.

The Decision

The Section 96 Application

10. It is relatively easy to determine this motion as it relates to the Company's section 96 application alleging violations of sections 5, 15, 70 and 76 of the Act by the Union.

11. Section 5 of the Act simply provides a right to persons to join a trade union of their own choosing. Accordingly, even assuming the Company as an employer has the status to rely upon a section of the Act which extend rights to employees, this is not a section of the Act which can be breached in any event. As dealt with further below, other sections of the Act (principally those within the "Unfair Practices" portion of the Act) are specifically designed to safeguard the right established by section 5. It is those sections of the Act, rather than section 5 itself, which may be breached in the course of a union's organizing campaign.

12. Section 15 of the Act provides that the Board shall not certify a trade union in certain particular circumstances. Accordingly, it is a section of the Act which relates to the Board's powers and responsibilities. The Board commented directly on the purpose of this section and its relation to various other sections of the Act in *Edwards and Edwards*, 52 CLLC ¶17027, in which it stated:

> The unfair practice sections of the Act (including section [70] which prohibits the type of employer conduct referred to in section [15], are, in large part, designed to safeguard the freedom of employees to join and to

> bargain collectively through the trade union of their own choice which is granted in section [5]. That purpose is furthered by the provisions of section [15] which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at "company-dominated" trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section [5] and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language, section [15] need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

13. Here, the Union is very clearly not a "company-dominated" trade union. If it were, why would this Company be opposing this application for certification? Further, on the material facts pleaded by the Company there is simply no basis for concluding that there was any "support" by the Company in the collection of membership evidence. The particulars, at their best, assert that Mr. Little, a working foreman who both parties agree is a bargaining unit employee, collected the membership evidence on behalf of the Union. It is alleged that Mr. Little did this because he was misled by the Union as to the nature and purpose of the documents he was asked to get signed and as a result so were all of the other employees that he spoke to. However, nowhere in the pleadings is it alleged that Mr. Little and/or any of the other employees were even told to sign because that is what their employer wanted them to do. Accordingly, these pleadings, on their face, do not set out a *prima facie* violation of section 15 of the Act.

14. Section 70 of the Act only applies to "employers, employers' organizations and persons acting on behalf of employers or employers' organizations". In the context of this application, the Union, which is the only named responding party, is not an employer or an employers' organization. Further, as the Board has stated in various decisions such as *The International Association of Bridge Structural and Ornamental Ironworkers,* [1982] OLRB Rep. Oct. 1487 and *Woodall Construction Company Limited,* [1979] OLRB Rep. June 597, a union is not a "person" under the "Unfair Practices" sections of the Act. Accordingly, this responding party, the Union, is not capable of violating section 70 of the Act.

15. Section 76 of the Act does apply to trade unions and accordingly is a section of the Act that this responding party is legally capable of violating. However, for this section of the Act to be violated the Board must find that the responding party has engaged in "intimidation or coercion". Here, the material facts relied upon by the Company do not, when examined closely, allow for the possibility of any such conclusion.

16. The position of the Company as set out in its particulars is that any of its employees working at the City Hall project who may have applied to become members of the Union actually signed the membership cards voluntarily and of their own free will when they were asked to do so by Mr. Little (or by Mr. Parent directly in the case of Mr. Little). Clearly the Company alleges that the employees were confused and/or misled and that they therefore did not realize what they were signing and what the membership cards would be used for. However, such allegations are a far cry from alleging any form of intimidation or coercion. Quite simply there are no allegations that Mr. Parent, or anybody else, even mentioned the possibility of negative consequences for anyone who did not sign and, as is clear on the face of the pleading themselves, absolutely nothing happened to Mr. Lachapelle, the one person on the site that the Company alleges refused to sign the document provided to him by Mr. Parent.

The Discretion to Order a Vote

17. Accordingly, even if all of the facts relied upon by the Company are true they do not, and cannot, give rise to a violation by the Union of any sections of the Act raised and therefore this application under section 96 of the Act is hereby dismissed.

18. The relevance of the Company's allegations in respect to the "card based system of certification" in the construction industry provided for under section 128.1 of the Act is, however, not so easily dealt with.

19. Under the provisions of section 128.1, the fundamental determinations which the Board must make concern the description of the bargaining unit and the percentage of employees in that bargaining unit who are members of the trade union. In this respect section 128.1(4) states:

> **128.1** (4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),
>
> (a) the bargaining unit; and
> (b) the percentage of employees in the bargaining unit who are members of the trade union.

20. Given the provisions of sections 128.1 (7), (12) and (13), in most cases there will be little, if any, significant dispute as to how the Board should dispose of an application for certification once the percentage of employees in the bargaining unit that are members of the union has been determined. There are, however, certain exceptions to this general rule.

21. Of specific relevance to this case are the provisions of section 128.1(13)(b) which provide the Board with the power to order a representation vote even where a union has exceeded the 55% employee support threshold required for certification on the basis of its membership evidence alone. There is, as of yet, no case in which the Board has actually exercised its power to order a vote under this section. Nevertheless, the Board has made certain comments concerning the questions it must consider in respect of this section and the circumstances under which the ordering of a vote might be appropriate. In *Four Seasons Site Development Ltd.*, [2005] OLRB

Rep. Nov./Dec. 954, the Board defined the nature of the determinations it must make in considering the exercise of its discretion under section 128.1(13)(b) as follows:

> 15. The issue before me with respect to both categories of membership evidence (collected more than six months before the application date and collected less than six months before the application date, but prior to June 13, 2005) is whether the Board should exercise its discretion to order a representation vote under section 128.1(13)(b) of the Act. I accept that the Board should not speculate about what an individual was thinking when he or she signed a card, nor should it make any specific enquiries about why someone signed a card. Rather, the Board must consider the external circumstances to determine objectively whether it is necessary to obtain confirmation of the employees' desire to be represented by a trade union through a representation vote.

22. In *Air Kool Limited,* [2005] OLRB Rep July/Aug. 525, the Board stated the following with respect to section 128.1(13) at paragraph 57;

> 57. Before the Board should consider the holding of a representation vote in an application under section 128.1 in circumstances where the Union has demonstrated that more than 55% of the employees in the bargaining unit were members of the union on the application date, there must be some flaw or doubt with respect to the membership evidence itself, or some problem arising from the process of the application. There is no need to enumerate a hypothetical list of such circumstances. It is enough to find that Air Kool has raised nothing that would cause the Board to deny the right of the union to choose the option it is entitled to take under the Act.

23. Section 128.1(5) would also appear to be specifically relevant to the type of allegations which the Company is attempting to rely upon here. This section states:

> **128.1** (5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.

24. Once again there are relatively few cases in which the Board has considered section 128.1(5) but in *PRW Excavating Contractors Ltd.*, May 19, 2006, Board File No. 3627-05-R, the Board stated the following at paragraphs 9 to 12 (inclusive):

> 9. PRW's second contention constitutes an attempt to make further submissions on its original argument. The Board's reasons for concluding that these statements did not, in and of themselves, demonstrate that the applicant had engaged in misrepresentation within the meaning of subsection 128.1(5) of the Act are set forth at paragraphs 18 and 19 of the decision of April 3, 2006 as follows:
>
>> "18. Therefore we conclude that misrepresentation by an applicant with respect to information it provides pursuant to subsection 7(12) *must include some additional element or*

> > *aspect that could not have been addressed by the provision of information in the normal course by the employer under subsection 128.1(3).* If we were to conclude otherwise, applicants making an election under 128.1 would be required to satisfy a stricter standard of accuracy in their "estimate" than applicants in applications for certification that are dealt with under section 8 of the Act and we are not convinced that there is any labour relations policy or reason that section 128.1(5) should produce this difference.
> >
> > 19 It is notable that PRW has not established any element of wrongdoing by the applicant through the statements filed. *On their face the most that they establish is some degree of error or misunderstanding by the applicant that could have been addressed by PRW's information under section 128.1(3) of the Act.*
> >
> > (italicized for emphasis)
>
> 10. This contention thus ignores the difficulty the Board had with these statements as evidence of the applicant's alleged misrepresentation in its completion of the application form, particularly information provided pursuant to subsection 7(12) of the Act. The difficulty was and is that these statements are no different than the information that PRW could have supplied under section 128.1(3) of the Act but did not. It was obvious to PRW that it could not have offered evidence of the number of its employees performing work of the bargaining unit on the application date pursuant to subsection 128.1(3) of the Act because its submissions were untimely and the Board's decision in *Air Kool Ltd.*, [2005] OLRB Rep. July/Aug. 525 closed that avenue.
>
> 11. The inclusion of the term "misrepresentation" in subsection 128.1(5) of the Act should not provide an employer, such as PRW, who has missed its statutorily specified opportunity to challenge the applicant's information with respect to the number of employees in the bargaining unit with an alternate avenue to the same destination. The submission of these statements is a transparent attempt by PRW to substitute an extraordinary process contemplated by subsection 128.1(5) of the Act for a routine one that is foreclosed to it due to its own internal administrative process.
>
> 12. It is notable, as a fact, that PRW made no allegations of wrong doing by the applicant. The absence of this sort of allegation alone, however, was not the basis for the Board's determination. There was an absence of allegations of wrong doing *or any other allegations* that would make these statements anything more than information PRW could have itself provided. The Board thus did not consider them evidence of "misrepresentation" under subsection 128.1(5) of the Act that should lead to different determinations under subsections 128.1(4) and (13)(a) of the Act in its decision of February 10, 2006.

25. In this case the Company has raised allegations which, on their face, state that there was "misrepresentation" in the obtaining of membership evidence, at the very least. While the allegations as pleaded may fall short of establishing a violation of the Act or fraud, misrepresentation is specifically listed as a separate basis for the evidence which the Board may

consider under section 128.1(5) and accordingly, and as all three of the above noted Board decisions suggest, establishing a violation of the Act and/or fraud is not necessarily a precondition for the Board to exercise its discretion under section 128.1(13) to order a representation vote.

26. Both parties agreed that the relevant standard to be met by the Union in a *prima facie* motion is a high one. For example, the Company relied on the Board's decision in *Michael Bouchard*, May 9, 2005, Board File No. 3786-04-U, in which the Board stated the following at paragraph 10:

> 10. The test is not a particularly stringent one for an applicant. The Board has in *The County of Brant*, [2000] OLRB Rep. Nov./Dec. 1106 set out the relevant principles that are applicable in determining whether an application has made out a *prima facie* case at pages 1107-08:
>
>> The Board in *International Union of Bricklayers and Allied Craftworkers*, Board File Nos. 1645-98-U and 1768-98-U, decision dated February 19, 1999, unreported, [1999] O.L.R.D. No. 1392, had occasion to discuss the approach used by the Board when determining whether to dismiss an application because it did not disclose a *prima facie* case. The Board stated at paragraphs 4 and 5:
>>
>>> The test that a responding party must meet in order to persuade the Board that an application should be dismissed on the basis that there is no *prima facie* case established in the application is, in my view, a strict one. An applicant should not be deprived of the opportunity to have a hearing on the merits of his or her application simply because the argument is novel or the circumstances giving rise to the application are unusual. In *Caravelle Foods*, [1983] OLRB Rep. June 875 the Board characterized the test a responding party must meet in seeking to have an application dismissed on a *prima facie* motion in the following terms at page 881:
>>>
>>> The words '*prima facie* case' in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render reasonable or arguable a conclusion that the Act has been breached.
>>>
>>> In *J. Paiva Foods Ltd.*, [1985] OLRB Rep. May 690 the Board set out the test at page 691 as follows:
>>>
>>> The Board's discretion to dismiss a complaint on the grounds that it does not disclose a *prima facie* case should only be exercised in the clearest of cases, that is, when the Board is satisfied that

> there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged.
>
> Where, however, the Board is satisfied that the responding party bringing the *prima facie* motion has met the burden imposed, it is incumbent on the Board to dismiss the application, thereby conserving the limited resources of the Board for matters that do require a hearing. As Mr. Justice Grange said in *Shaw v. McLeod*, (1982), 35 O.R. (2d) 641:
>
> I concede that on this motion if, after a careful review of the law, the Court determines that he [the Plaintiff] cannot possibly succeed, then his action should be mercifully dispatched.

See also *Elizabeth Balanyk*, [1987] OLRB Rep. Sept. 1121 at page 1123; *Lyndhurst Hospital*, [1996] OLRB Rep. May/June 456 at 465-66; and *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (S.C.C.), 74 D.L.R. (4th) 321 (S.C.C.) where the Supreme Court of Canada wrote at page 333:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

27. The Union relied on the Boards decision in *Ottawa-Carleton Public Employees Union, Local 503*, January 17, 2006, OLRB File No. 0109-05-U, which contained exactly the same quote from *International Union of Bricklayers and Allied Craftsmen, supra,* set out above.

28. In this case, the "external circumstances" as set out by the Company (and which must be assumed to be true) are, at their core, that the employees working at the City Hall project did not realize that they were signing applications to join the Union (despite the clear wording of the document) and that this was the case because they were told that what they were signing were "information sheets" to be used by the Union to collect payments from the general contractor. Given the nature of the Company's allegations, the wording of section 128.1(5) which allows the Board to consider evidence concerning misrepresentation, and the fact that under section 128.1(13)(b) the Board may order a vote but that there are as of yet no cases in which the Board has directly considered when it should do so, it can not be said that here there is no reasonable

likelihood of the Company being able to succeed in persuading the Board that these external circumstances mean that it is necessary to obtain confirmation of the employees' wishes by ordering a representation vote. As noted above, dismissals on a *prima facie* basis should be reserved for the clearest of cases. This is not such a situation and accordingly the Union's motion with respect to this portion of the Company's response is dismissed.

Issue #2 The Request for Disclosure

29. The second matter to be decided in this decision concerns the Union's request for disclosure of certain written statements made by witnesses in these proceedings.

The Facts

30. As set out in the Board's decision of February 21, 2007, the Union has challenged the employee status of seven individuals on the basis (at least in part) that they were not performing bargaining unit work for the majority of their time on the date of application. In its submissions to the Board dated February 9, 2007, in which it specifically set out its positions concerning employee status, the Union made the following request for pre-hearing disclosure:

> The Carpenters request that the Employer produce all contracts, sub contracts, invoices, log books, related to the Englehart Hospital site including but not limited to all payroll records, and documentation related to the rental or use or purchase of all equipment and material related to the work performed at the Englehart Hospital site for the 2 week period starting November 11 – 25, 2006.

31. This request was dealt with in paragraph 9 of the Board's February 21 decision which states:

> 9. In its submissions of February 9, 2007, the applicant requested pre-hearing disclosure from the responding party of certain documents. In its submissions, also filed on February 9, the responding party provided various documents to both the Board and the applicant, although the responding party was, at the time, obviously unaware of all of the documents being sought by the applicant. Therefore, the responding party is to, by no later than March 21, 2007, provide to the applicant copies of all documents listed in the applicant's February 7 request which it has not already provided and which it is willing to provide. By the same date the responding party is to advise the Board, and the applicant, of those documents which it refuses to provide along with any submissions concerning the request for pre-hearing disclosure which it wishes the Board to consider. The applicant may, by no later than April 4, 2007, file with the Board and the other party any submission which it wishes the Board to consider concerning disclosure. The Board will thereafter determine any remaining disputes concerning pre-hearing disclosure in advance of the first day of hearing of this matter.

32. The Union did not file any submissions with the Board concerning the insufficiency of the Company's disclosure by the April 4, 2007 deadline established by the Board. On May 11, 2007, the Union did however make the following request for additional disclosure to counsel for the Company:

> Further to my voicemail message of today, in addition to the documentation produced thus far in the above-noted matter, we are requesting that you produce the following prior to the commencement of the hearing on Monday:
>
> Any and all drawings with respect to the Englehart Hospital site;
>
> In addition, we are also requesting the same for the Haileybury City Hall site; however we do not require them until Tuesday May 15th.

At the commencement of the hearing on May 14, 2007, no requests concerning disclosure were raised with the Board. Certainly then, prior to August 28, 2007, the disclosure of "notes" had never been requested.

33. As noted above, the hearing in this matter commenced on May 14, 2007 and continued thereafter on May 15 and August 14, 15 and 28, 2007. By August 28, 2007, five of the six employees that were allegedly at work, performing bargaining unit work, on the Englehart Hospital job site, and whose employee status was challenged by the Union, had completed giving their evidence. Obviously, given the nature of the dispute between the parties, the issue of what work these employees were performing on the date of application was central to the evidence that these witnesses gave. The sixth of these employees, Jean Paul Parent, gave his evidence on August 28, 2007. In the course of his evidence, he testified to having previously written a statement concerning the work he performed on the date of application at the request of his employer. Mr. Parent did not keep a copy of this statement and had not seen it since the day he completed it. He stated he had not reviewed the statement prior to giving his evidence and that none of his evidence was based on the statement.

34. Upon learning of the fact that Mr. Parent had made a written statement concerning the events of November 15, 2006, counsel for the Union sought disclosure of it from the Company. Thereafter it became apparent that not only had Mr. Parent made such a statement but so had all of the other employees whose status is in dispute. The Union requested disclosure of all of the statements. The Company objected to providing disclosure on the basis that these statements were covered by litigation privilege. The Board ordered the parties to make written submissions to the Board concerning this matter, which they both did.

35. In complying with the Board's direction to file written submissions including a list of the employees' statements and when they were made, counsel for the Company filed an affidavit of Karl Pedersen sworn on September 6, 2007. Paragraphs 8 and 9 of this affidavit state the following with respect to these statements:

> 8. Subsequent to obtaining such employee statements as requested by Mr. Ruddy, I then forwarded to Mr. Ruddy by facsimile transmission on December 20, 2006, statements of the following employees:
>
> - Eric Gaboury obtained on December 8, 2006
> - Luc Ladouceur obtained on December 7, 2006
> - Ed MacKewn obtained on December 8, 2006
> - Curtis McBride obtained on December 6, 2006
> - Oscar Vinette obtained on December 8, 2006
> - Dustin Curran obtained on December 8, 2006

> - Jeffrey Dessureault obtained on December 7, 2006
> - Chris Inglis obtained on December 8, 2006
> - Dan Little obtained on December 7 or 8, 2006
> - Jerry Ridley obtained on December 7, 2006
> - Charles Lachapelle obtained on December 7, 2006
>
> 9. The twelfth statement which was obtained in accordance with Mr. Ruddy's request was a statement obtained from employee Jean Paul Parent on December 22, 2006, and this statement was provided to Mr. Ruddy when I met with him in preparation for the Regional Certification Meeting of this Application for Certification which proceeded in Ottawa on January 19, 2007.

36. For the reasons set out below the Union's request for disclosure of these statements is denied.

37. The Union asserts that these statements are not covered by litigation privilege. With respect I disagree. The statements were made on December 6, 7, 8 and 22, 2006 and accordingly, there can be no dispute that that they were all made after this application had been filed, after the Company had retained counsel, after counsel for the Company had filed a response on its behalf with the Board and after the Board (differently constituted) had issued its first decision in this matter, dated November 29, 2006, in which the Board noted the various issues in dispute. One of the issues so noted is the percentage of employees at work in the bargaining unit that were members of the Union on the date of applications. With respect to this issue the parties were specifically advised by the Board of their duty under the Board's Rules to file employee status submissions following the upcoming Regional Certification Meeting. Such submissions would normally require counsel for a party asserting that particular employees were at work, performing bargaining unit work, on the date of application to provide particulars as to what his or her client claims the employees whose status is in dispute were doing on the day.

38. The collection of information by the Company's counsel concerning what employees may have been doing on the date of application following the receipt of the Board's November 29, 2006 decision is then completely consistent with preparation for litigation. Conversely the Union's submission that the dominant purpose behind these statements was to enable employees to remember what they had been doing on November 15th is not nearly so convincing. In this respect the evidence of Mr. Parent about his statement is illustrative. His evidence was to the effect that he did not know why he had been asked to write the statement, that he had not seen his statement since he'd made it on December 22, 2006, that prior to giving his evidence he had not used the statement to aid his memory and in fact he could not, on August 28, 2007, even remember what he had said in his statement.

39. Even if the Board finds, as it does, that these statements are covered by litigation privilege, the Union argues that disclosure should still be ordered based on the Board's decision in *Graham Brothers Construction Ltd.*, [2001] OLRB Rep. Sept./Oct. 1163 (Sept. 28, 2001) In that case the Board thoroughly reviewed the issue of litigation privilege as it related to a request for the disclosure of the notes made by union organizers. At paragraphs 30 and 31 of that decision the Board stated:

> 30. The Board is not required to exclude evidence even if it is found to be protected by litigation privilege. The exercise of determining the admissibility of evidence rests upon the discretion of the Board and requires the balancing of competing interests. On one hand the Board appreciates the obvious value of the notes for the many reasons already cited. The notes may represent the best evidence available to the Board in determining voter eligibility. The Board also recognizes the potential prejudice which may be occasioned should the notes be produced. Ordering the notes to be produced has the potential to undermine the adversarial litigation process and could discourage the parties from pursuing areas of inquiry. In addition the notes may disclose organizing strategies on the part of the trade unions. (The Board notes that disclosure is not without restriction. The Board draws the parties' attention to *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659 and the discussion therein regarding the implied undertaking that any such documents will not be used for collateral or ulterior purposes.)
>
> 31. In the circumstances of this case, however, the Board is persuaded that the potential value inherent in the notes far outweighs any prejudice which may result. As noted previously, the notes do not contain opinions but are contemporaneous factual recordings of the events of June 19, 1999. They represent an extension of the membership evidence already filed by the trade unions as required by Rule 131. They ought to be produced.

40. I agree with the above decision of the Board but here the balancing of competing interests leads to the opposite conclusion. In *Graham Brothers, supra,* the notes in question were the contemporaneous notes of union organizers who had been watching the company's workforce for a number of months with a specific view to recording who was doing what work, on what job sites, on the date of application. That is simply not the case here. These statements were made between three and five weeks following the date of application, by individual employees that had no specific knowledge about applications for certification in general and for whom what work they did on November 15 only became significant (if at all) a number of days later after they became aware that the Union had filed its application. In such circumstances the information recorded in these statements could be given very little, if any, weight. Accordingly, the potential undermining of the adversarial litigation process, which ordering the disclosure of statements covered by litigation privilege would cause, outweighs any potential value that these statements would have in these proceedings.

0810-05-G United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant v. **Rosmar Drywall & Acoustics Ltd.**, Responding Party

Construction Industry Grievance – Health and Safety – The union complained that the employer had requested an additional drywaller, then chose not to hire the worker when it learned he did not have fall arrest training, a requirement under the *Occupational Health and Safety Act* which would qualify him as a "competent worker" – The Board found that the collective agreement at the time did not require fall arrest training for workers for them to be considered competent, therefore the employer had no legitimate reason to consider the dispatched worker not competent – The collective agreement did contemplate, however, that the employer retained the exclusive right to make decisions regarding hiring

and staffing levels – Although the employer requested an additional worker, it did not hire the employee referred from the hiring hall and ultimately used only its existing complement to complete its contract – The employer did not violate the collective agreement by failing to employ the worker – But because the worker sent to the employer was competent, the union was entitled to damages under the collective agreement for the referral – Grievance allowed in part

BEFORE: *Mark* J. Lewis, Vice-Chair.

APPEARANCES: *D. Wray* and *Glenn Morrice* appearing for the applicant; *C. E. Humphrey, J. Schwartz* and *A. Beingessner* appearing for the responding party.

DECISION OF THE BOARD; November 15, 2007

1. This is the referral of a grievance in the construction industry to arbitration pursuant to the provisions of section 133 of the *Labour Relations Act, 1995,* S.O. 1995, c. 1, as amended (the "Act"). The applicant is the United Brotherhood of Carpenters and Joiners of America, Local 18 (the "Union") and the responding party is Rosmar Drywall and Acoustics Ltd. (the "Company")

2. This grievance concerns the failure of the Company to "employ" Mr. Frank Frankovitch on or about May 4th, 2005 because he had not, at the time, completed fall arrest training. The Union alleges that, by refusing to hire and/or employ Mr. Frankovitch, the Company violated various article of both the Master Portion and the Acoustic and Drywall Appendix of the Provincial ICI Collective Agreement for Carpenters which was in effect from May 2004 to April 2007 (the "Collective Agreement"). The parties acknowledge that, in the most recent round of ICI bargaining, the issue of fall arrest training was addressed and new language for Article 16.01 of the Master Portion was agreed to such that this precise issue will not arise in the same way in the future. Further, shortly after the events relevant for this grievance, Mr. Frankovitch completed his fall arrest training.

The Facts

3. The facts relevant for this grievance were not in dispute and were stipulated to the Board by the parties at the outset of the hearing.

4. The Company is a drywall contractor working throughout the province which was bound to the Collective Agreement. In the spring of 2005 the Company commenced drywall work on a Shoppers Drug store project located at the Eastgate Square Mall in Hamilton (the "project").

5. Hamilton falls within the geographic jurisdiction of Local 18.

6. The general contractor for the project, McKay Cocker Construction Ltd., advised all of its sub-contractors, including the Company, that all of the workers on the project were required to wear fall arrest equipment and were therefore required to have completed fall arrest training pursuant to the provisions of the *Occupational Health and Safety Act,* R.S.O. 1990. c. 0.1, as amended (the "OHSA") and certain regulations there under. There is no question that the drywallers employed on this job site had to, and did in fact, use fall arrest equipment and,

accordingly, were required to have completed fall arrest training by virtue of sections 26 to 26.9 of *O. Reg213/91*, amended to *O. Reg. 85/04* (the "Regulations").

7. The first three workers employed by the Company on this project, including one who was referred to work by the Union, had previously received fall arrest training. Mr. Frankovitch reported to the project on May 4th, 2005 pursuant to a request for manpower which the Company had made to the Union the previous day. When questioned, Mr. Frankovitch advised the Company's foreman that he had not received fall arrest training and he was advised that therefore the Company was not prepared to employ him and he was sent away without having performed any work on the site. Thereafter no further requests for manpower were made and the Company completed its work on the project using the three existing employees.

8. It was agreed that Mr. Frankovitch had been a member of the Union for approximately 20 years and had been employed as an apprentice and then a journeyman in the drywall industry during all of those years.

9. Finally, it was agreed that the issue of fall arrest training, and specifically the question of whether or not a person that presents himself as a journeyman in this industry must have completed such training, had arisen between these parties before. Specifically, since at least April 2004 the Company had advised all of the Ontario local unions of the Carpenters, including Local 18, that it took the position that workers were required to have such training before being referred to work as journeymen under the Collective Agreement and further that the Company had specifically advised the Union that fall arrest training was required when it requested manpower from the Union for this project in May 2005. Conversely, the Union never accepted, and in fact had specifically rejected, the Company's position that workers were required to have completed fall arrest training in order to be considered journeymen.

The Positions of the Parties

10. Put at their simplest, the positions of the parties were quite straight forward.

11. It was the Union's position that the Company's decision to refuse to employ Mr. Frankovitch in these circumstances was not justified as, once Mr. Frankovitch had been referred for work pursuant to a request for manpower, the Company was under a legal obligation to train him if it required him to use fall arrest equipment. The starting point for this argument was Article 5 of the Acoustic and Drywall Appendix which (in part) states:

> **ARTICLE 5 – UNION SECURITY** (Special Provision)
>
> (This Special Provision shall replace Article 5 in the master portion of the Agreement.)
>
> …
>
> (b) All employees covered by this Appendix shall be hired through the offices of the affiliated Local Unions. …
>
> (c) … It is understood that, if the Local Union or District Council is unable to provide the required competent workmen within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment before commencing work, apply to the affiliated Local Union having jurisdiction for the job

> or project where said manpower is working, and shall comply with all the applicable union regulations for membership therein.

12. The Union claimed that, as Mr. Frankovitch had been employed for a great many years as a journeyman in the drywall industry, he was clearly a "competent workman" within the meaning of Article 5(c) of the Appendix. In this respect the Union contrasted the wording of the Appendix to that of Article 5.01(a) of the Master Portion (which Article 5 of the Appendix specifically replaces for acoustic and drywall work). Article 5.01(a) of the Master Portion specifically refers to the Union supplying employers with "qualified employees in sufficient numbers who are capable of performing the work required".

13. Given the language of the Collective Agreement, and that of the Appendix in particular, the Union took the position that once it has been accepted that Mr. Frankovitch was "competent" then the Company's discretion to reject him was essentially eliminated and its decision to do so was certainly not reasonable here given that it was under a legal obligation to train its employees. In this respect it relied on the fact that there was nothing in the Collective Agreement (as it then read) which required Union members to have completed fall arrest training prior to being referred to work; such training does not form part of the skills required to be a journeyman drywaller; and, the OHSA and its Regulations place the obligation to provide such training, if required, squarely upon the employer. Specifically, the Union noted that Section 26.2 of the Regulations states:

> **26.2** (1) An employer shall ensure that a worker who may use a fall protection system is adequately trained in its use and given adequate oral and written instructions by a competent person.
>
> (2) The employer shall ensure that the person who provides the training and instruction referred to in subsection (1) prepares a written training and instruction record for each worker and signs the record.
>
> (3) The training and instruction record shall include the worker's name and the dates on which training and instruction took place
>
> (4) The employer shall make the training and instruction record for each worker available to an inspector on request.

14. In response, the Company argued that in the specific circumstances of this industry in this Province the definition of a "competent workman" for the purposes of Article 5 of the Appendix must mean a person who has completed fall arrest training. It took the position that the reason why hiring hall provisions are found in construction industry collective agreements eminates from the premise that the unions have a supply of skilled members who are able to perform the work required without the need for any basic training. In this respect it asserted that mandatory fall arrest training has been a legal requirement in Ontario since at least 2002. It relied on the fact that the circumstances where drywallers are legally required to wear fall arrest protective equipment, and are therefore required to have been trained, are very common (or even now the norm) on construction sites in Ontario. Therefore, it argued that to be a drywall journeyman who is "competent" within the meaning of this Collective Agreement a worker must possess this training since it is so necessary to legally perform the ordinary and common work of the trade.

15. The Company does not dispute that the OHSA and its Regulations place certain obligations upon it. However, it notes that these obligations only require it to ensure that its

employees have received fall arrest training (rather than actually obliging it to provide the training) and that such obligations are irrelevant in this case in any event as Mr. Frankovitch never became its employee. In this respect the Company asserted that its right to hire is specifically preserved by the management's rights clause, being Article 25 of the Master Portion of the Collective Agreement. It claimed that in this case it simply decided that it would not hire Mr. Frankovitch because he could not legally perform the work required and as such he was not "competent" and that therefore its decision not to employ him was completely reasonable.

The Decision

16. Despite the able argument presented on behalf of the Company, I do not find that a worker had to possess fall arrest training to be considered a "competent workman" under the Acoustic and Drywall Appendix as it then read. Fall arrest equipment, and therefore fall arrest training, is only required in certain specific circumstances. As Mr. Frankovitch's own work history from 2002 to 2005 aptly demonstrates, a person can work as a journeyman within the drywall industry without such training. Therefore, although clearly a valuable qualification and one which is obviously required in a number of specific circumstances, fall arrest training cannot simply be assumed to be a mandatory requirement of the trade such that every worker must possess it in order to be considered a fully trained journeyman.

17. Further, there were no provisions within the Collective Agreement, as it then read, which specifically required this training for a worker to be considered competent. The two EBA's in question are sophisticated parties with a long history of bargaining this particular Collective Agreement. Had they intended that a worker be required to have undergone such training before being considered competent they could have quite easily and clearly said so in their Collective Agreement.

18. However, in the particular circumstance of this case, the conclusion that Mr. Frankovitch was competent is not sufficient, in and of itself, to establish that the Company violated the Collective Agreement in the manner claimed by the Union and that therefore the relief requested is appropriate. The specific rights which the Company maintained by way of the management's rights clause must also be considered. Article 25 of the Master Portion of this Collective Agreement, which sets out these specific rights, states.

> **ARTICLE 25 – MANAGEMENT RIGHTS**
>
> **25.01** The Union agrees and acknowledges that the Employer has exclusive rights to manage the business and to exercise such rights without restriction, save and except such prerogatives of management as may be modified by the terms and conditions of this Agreement. Without restricting the generality of the foregoing it is the exclusive function of the Employer;
>
> (a) to transfer, hire, direct, promote, demote, lay-off, discipline and discharge for just cause employees and to increase or decrease the working forces in accordance with the terms of this Agreement;
>
> (b) to determine the materials and methods to be used, design of the products to be handled, facilities and equipment required.

> **25.02** It is agreed that the rights mentioned in Section 25.01 shall not be exercised in a manner contrary to the provisions of this Agreement.

19. Therefore, although circumscribed by the terms of the Collective Agreement and a requirement to act reasonably, the Company retained, through the management's rights clause, the right to make decisions concerning hiring and manpower levels. Had Mr. Frankovitch actually become an employee of the Company there is little doubt that, as the Union argued, it would have been legally obliged to train him. However, here he was never in fact hired. Rather the Company determined that it would not hire him and would instead simply complete the work with their three existing employees. As such there remains the question of whether, under the terms of this Collective Agreement, the Company was obliged to hire (and thus thereafter train) Mr. Frankovitch once it had made the request for men, and he had been referred, or was it entitled to change its mind about using a fourth worker.

20. As the cases relied upon by the parties note (see for example *Ontario Hydro*, [1983] OLRB Rep. Jan. 99, *Stone and Webster Canada Limited*, [1990] OLRB Rep. July 801 and *E.S. Fox Ltd.*, [1986] OLRB Rep. April 438) there is, under construction industry collective agreements generally, a specific and direct correlation between being referred to work and becoming an employee of a particular employer, but these two concepts are not synonymous. In this particular case, the distinction between the two is made clear by the specific language of Article 12 of the Master Portion of the Collective Agreement:

> **ARTICLE 12 – REPORTING ALLOWANCE**
>
> **12.01** When an employee reports for work as usual but is unable to commence work because of: (a) circumstances beyond his control, except inclement weather or labour disputes, he shall be given two hours' pay plus any applicable travel allowance, or (b) inclement weather, he shall be given one hour's pay plus any applicable travel allowance for reporting on the job provided, however, that the employee remains on the job during either of the aforementioned periods.
>
> **12.02** If the employer advises an employee that he may leave the job the employee shall be paid the hours of pay and applicable travel allowance as outlined in 12.01(a) or (b).
>
> **12.03** If reporting time occurs during Holidays (as defined herein, including Saturday & Sunday) or overtime hours, the applicable premium rate shall apply.
>
> **12.04** When instructed to wait beyond the periods set out in 12.01(a) or (b), the employee shall be paid, in addition to the reporting allowances, the applicable hourly rate for the shift for the period of the extended wait.
>
> **12.05** When a member reports to a job for hiring at the request of the employer and is not hired although willing and able to do the work he shall receive two hours' pay at the applicable rate plus the applicable travel allowance and the employer shall pay the required contributions to the fringe benefit plans.

21. As is apparent by the use of the words "member [who] reports to a job for hiring at the request of the employer and is not hired" within Article 12.05, (particularly when contrasted with

the use of the word "employee" in Article 12.01, 12.02 and 12.04), a person has not become, and may in fact never become, an employee simply because he has been referred to work. Under this Collective Agreement, a Company apparently has the rights to request manpower and thereafter change its mind and not hire members who have reported to it in order to be hired. Of course in making it decision not to hire, an employer must still act reasonably and can not act in violation of the Collective Agreement but neither of these restrictions mean that an employer is automatically obliged to hire a member who has reported to it and/or that such a member has a guarantee of becoming an employee.

22. When Mr. Frankovitch reported to work on May 4th, 2005, this Company chose not to hire him. As is apparent from the findings set out above concerning competency, the Company would not have been entitled to reject Mr. Frankovitch and hire, either through the Union or otherwise, someone else in his place. To do so would have clearly violated Article 5 of the Appendix but that is not what occurred here. Instead the Company chose not to hire anyone else and simply performed the work with its existing workers.

23. There are obviously many legitimate considerations which may impact upon an employer's decision on whether to increase the size of its workforce or to do the work with the workers it has, including considering whether increasing the workforce will require additional training. Quite simply, if faced with such a choice, an employer is entitled to decide that it will use the workforce that it has rather than providing the training that the hiring of additional workers would require. Under the provisions of Article 25.01(a) of the Master Portion of the Collective Agreement, an employer has the right to make decisions concerning the increase or decrease of its work force including making decisions overturning previous decisions. Here there is simply no dispute that Mr. Frankovitch, who had not yet become an employee, could not legally do the work required without training and that this Company had no interest in providing such training. In these circumstances, therefore, the Company's decision to reverse itself and decide not to hire Mr. Frankovitch once it realized that in order to do so it would have to provide training, can be considered reasonable.

24. Based on all of the above, I hereby find that the Company did not violate the Collective Agreement by refusing to employ Mr. Frankovitch and the grievance, in that respect, is denied. However, I have also found that when Mr. Frankovitch reported to the project and was not hired on May 4th, he was a competent workman within the meaning of Article 5 of the Appendix and must therefore be considered to have been "willing and able to do the work" within the meaning of Article 12.05 of the Master Portion of the Collective Agreement. Accordingly, I find that the Company violated this Article of the Collective Agreement by failing to make the required payments and I hereby order the Company to pay to the Union damages in the amount of two hours pay, travel allowance and two hours of contributions to the fringe benefit plans, all at the applicable rates provided for in the Collective Agreement.

0109-07-ES Hossein Mohammadi, Applicant v. **Superior-1 Cleaning Services Ltd.**, and Director of Employment Standards, Responding Parties

Dependent Contractor – Employee – Employment Standards – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the

company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the Employment Standards Act – Application allowed

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Hossein Mohammadi* appearing on his own behalf; no one appearing for the responding parties.

DECISION OF THE BOARD; December 6, 2007

1. This is an employee application under the *Employment Standards Act, 2000*, S.O. 2000, c. 41, as amended ("the Act") for review of a refusal to issue an Order to Pay.

Background

2. The Employment Standards Officer found that Mr. Mohammadi was a subcontractor, not an employee within the meaning of the Act, and as such was not entitled to wages he claimed he earned but was not paid.

3. Mr. Mohammadi disagrees with the Officer's finding. He contends he was an employee of the company.

The Evidence

4. Neither the responding party employer ("the company" or "Superior") nor the Director of Employment Standards ("the Director") attended at the hearing on November 6, 2007. Mr. Mohammadi was the only person to testify, and my findings of fact are therefore based exclusively on his evidence.

5. In March 2006, Mr. Mohammadi responded to an advertisement placed by the company in a Toronto newspaper. The advertisement said the company needed people to provide cleaning services. Mr. Mohammadi inquired by phone, and reached Gabriella whom he later understood to be the spouse of Eric Schwartz, the person with whom he entered into an agreement setting out the terms of Mr. Mohammadi's engagement with Superior. Gabriella told Mr. Mohammadi to meet her that evening at St. Mario Restaurant in Whitby, at midnight.

6. Mr. Mohammadi went to the restaurant as directed and met Gabriella. She demonstrated how the restaurant was to be cleaned. Later she told Mr. Mohammadi that he should report for work at a Swiss Chalet restaurant on Dundas Street in Whitby the next night at

midnight. She told him that after that, he could arrive for work at any time between 11:00 p.m. and 1:00 a.m., so long as he completed the work by 6:30 a.m.

7. Mr. Mohammadi went to the Swiss Chalet the next evening. Mr. Schwartz was there to meet him. Mr. Schwartz showed Mr. Mohammadi the supply closet containing the materials necessary to clean the restaurant. He also showed Mr. Mohammadi how to clean the kitchen floor, which, due to the build-up of oil during the day, required two mopping applications.

8. Then, after giving Mr. Mohammadi the key and security code to the restaurant, Mr. Schwartz provided Mr. Mohammadi with a five-page document entitled "Cleaning Subcontract Document". I shall refer to it simply as "the agreement". The agreement contains thirty-eight clauses. I shall not set them out word for word in all their detail. However, a significant number of the provisions in Part I of the agreement are arguably relevant to the issue in dispute in this matter, and I shall describe those clauses briefly below:

- Clause 1 contemplates that the subcontractor, i.e. Mr. Mohammadi, will issue monthly invoices to Superior;

- Clause 2 requires Mr. Mohammadi to select another individual as a replacement in case of absence, "subject to the advance approval of Superior-1 Cleaning Services Limited";

- Clause 4 provides that Mr. Mohammadi must give thirty days' verbal and written notice to terminate the contract, whereas Superior may terminate Mr. Mohammadi's services at any time;

- Clause 5 stipulates that in the event of "unsatisfactory workmanship, attitude, abusive behaviour, or theft", the company may terminate the contract immediately and withhold any and all monies owing to Mr. Mohammadi;

- Clause 8 contemplates the possibility that Mr. Mohammadi will hire other subcontractors;

- Clause 11 strictly forbids Mr. Mohammadi from soliciting Swiss Chalet for the purpose of taking over the cleaning contract from Superior during the term of the agreement and three years thereafter;

- Clause 12 requires Mr. Mohammadi to provide, at his expense, a police clearance certificate to verify that he has no criminal record;

- Clauses 15 and 16 stipulate that Mr. Mohammadi is not an employee of Superior; Clause 13 provides that he is responsible for his own income tax, and that the company will not pay him GST;

- Clause 19 requires Mr. Mohammadi to follow the cleaner's checklist every night on a consistent basis (there was no evidence as to what that checklist entails);

- Clause 22 requests Mr. Mohammadi to provide a telephone number at which Superior is likely to be able to reach him at any time; moreover, the company demands same-day return phone calls in response to any voice messages left by Superior with Mr. Mohammadi;

- Clause 25 stipulates that Mr. Mohammadi's monthly payment is "pre-set and agreed upon…and is non-negotiable";

- Clause 27 states that Superior will not pay Mr. Mohammadi for any statutory holiday on which the restaurant closes (or, for that matter, for any day the restaurant is closed for any other reason);

- Clause 26 provides that if Mr. Mohammadi is unable to work for any reason, he must inform Superior immediately, failing which the company "may withhold any and all monies owed to the subcontractor(s) for the entire duration the subcontractor worked for" the company;[1]

- Clause 28 requires Mr. Mohammadi to wear proper footwear while working on greasy, slippery floors;

- Clause 30 states in part: "the subcontractor(s) have been hired by Superior-1 Cleaning Services Ltd. to perform janitorial service at Swiss Chalet…"

- Clause 33 prohibits Mr. Mohammadi from revealing any information about his business dealings with Superior to Swiss Chalet, and further requires Mr. Mohammadi to immediately notify Superior of any attempt by Swiss Chalet to inquire about those business dealings;

- Clause 34 states that Mr. Mohammadi's failure to perform "high dusting" at the frequency specified in the nightly check list will result in a $50 deduction from pay for each such failure;

- The agreement contains no reference to a particular term of operation.

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[1] The withholding of monies by Superior for any number of reasons (including disputes between Superior and Swiss Chalet regarding Swiss Chalet's monetary obligations to Superior) is a common theme throughout the agreement.

9. Following Part I of the agreement is a section entitled, "Brief Questionnaire" with four questions, and a Yes/No option beside each. None of the questions in Mr. Mohammadi's agreement was marked with either a Yes or a No. The fourth question asks: "Does/do the subcontractor(s) fully understand everything listed in this contract? *note*: (if you do not understand everything listed in this contract please ask a supervisor of Superior-1 Cleaning Services Ltd. *any* question(s) you may have!)".

10. On page five of the agreement, beside "Subcontractor Amount" is inserted in type: "$1,300 per month. (Non-negotiable)". Further down on page five, the agreement stipulates that "[t]he subcontractor(s) shall perform janitorial services seven (7) days per week in a professional manner for the aforementioned contract location listed on page five."

11. Mr. Mohammadi saw the word "subcontractor" on page 5, the signing page, and asked Mr. Schwartz what it meant. Mr. Schwartz told Mr. Mohammadi not to worry, that he should just start work and Mr. Schwartz would see that Mr. Mohammadi was paid $1,300 per month. Mr. Mohammadi signed the agreement.

12. Mr. Mohammadi worked nine consecutive nights at the Swiss Chalet restaurant in the latter part of March 2006. Mr. Schwartz came by on occasion to see if Mr. Mohammadi needed anything, and on one occasion, to give Mr. Mohammadi a new mop. Mr. Mohammadi provided no materials of his own to do the work. All he provided was his labour.

13. Mr. Mohammadi found the work of cleaning the restaurant much more demanding in terms of the time required to complete the job than he had thought.[2] He asked Mr. Schwartz to consider a higher monthly rate for the work, or possibly a different assignment with a higher monthly rate. Mr. Schwartz said he would consider the latter scenario if such an assignment arose.

14. On the tenth night, Mr. Mohammadi arrived at the restaurant to find Mr. Schwartz there with three individuals he did not recognize. Mr. Schwartz told Mr. Mohammadi that he was giving the new people the Swiss Chalet job, and Mr. Mohammadi a new assignment at a restaurant in Ajax. He provided Mr. Mohammadi with an address, and told him to meet Mr. Schwartz there the following evening.

15. Mr. Mohammadi went to the new address the next night. Mr. Schwartz did not appear. Mr. Schwartz did not answer his cell phone either, on the several occasions that Mr. Mohammadi called about his work and his pay. Mr. Mohammadi never received any money from Superior for the work he did at the Swiss Chalet restaurant.

16. Mr. Mohammadi informed me that, in addition to working for Superior for the short period in March 2006, he also cleaned a bingo hall. After his experience at Superior, he developed a business card for cleaning services.

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[2] There was no evidence before me as to how many hours Mr. Mohammadi worked per shift, or when his shifts actually began and ended.

Analysis and Conclusions

17. Section 1 of the Act defines "employee" and "employer" as follows:

> "employee" includes,
>
> (a) a person, including an officer of a corporation, who performs work for an employer for wages,
>
> (b) a person who supplies services to an employer for wages,
>
> (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
>
> (d) a person who is a homeworker,
>
> and includes a person who was an employee;
>
> "employer" includes,
>
> (a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and
>
> (b) any persons treated as one employer under section 4, and includes a person who was an employer;

18. A number of tests have been developed over the years by the courts to assist in determining whether or not there exists an employment relationship.[3] The Supreme Court of Canada, in *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.* [2001] S.C.R. 983 at paragraph 46, pointed out that no one test is necessarily conclusive of the question. What is essential for the inquiry is to determine whether the person performing the services is doing so as a person in business on his own account.

19. Was Mr. Mohammadi in business for himself? The one factor that most strongly suggests that the relationship between Superior and Mr. Mohammadi was not one of employment is the agreement, or to put it more finely, certain provisions of the agreement. For example, the clause which contemplates that the subcontractor may hire others in his place, or the provisions which insist that the relationship is not one of employment and that income tax will not be deducted at source, or the requirement in the agreement that the subcontractors not compete with Superior for cleaning contracts; these portions of the agreement suggest a business, rather than an employment, relationship.

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[3] These are described briefly in *Re Eiler* [1994] O.E.S.A.D. No. 165 (April 7, 1995) as the four-fold test, the organization test and the statutory purpose test. As the Referee explains, the Act's definitions of "employee" and "employer" have been traditionally interpreted in a broad fashion with the assistance of the aforementioned tests, the latter two of which evolved as a result of "certain perceived rigidities in the application of the criteria of control, ownership of tools, chance of profit, and risk of loss [the criteria applied in the four-fold test] in the face of 'novel situations'." (page 11)

20. Some other clauses in the agreement, however, reflect the very kinds of things one might expect to see in an employment relationship, such as:

- Superior's right to terminate the agreement due to the bad behaviour or shoddy work of the subcontractor;
- Superior's insistence that the subcontractor comply with the nightly cleaning checklist;
- Superior's demand that the subcontractor return phone calls immediately, and that the subcontractor report instances in which Swiss Chalet inquires into the relationship between them;
- Superior's right to approve the subcontractor's replacement;
- The requirement for the subcontractor to verify that she has no criminal record;
- The requirement for the subcontractor to wear safe shoes.

21. In short, the agreement is far from unequivocal proof of the true relationship between the company and Mr. Mohammadi, despite its ostensible designation as a commercial subcontract. What is clear from the evidence taken as a whole is this: all that Mr. Mohammadi brought to the relationship was his labour as a janitor. He did not engage in any business promotion to secure the work from Superior. He had virtually no say in any of the terms and conditions set out in the agreement, including the non-negotiable monthly pay. It even appears he did not understand what the terms "subcontractor" entailed. He did not provide his own equipment or cleaning supplies. The work required of him – sweeping and mopping – can only be carried out in an extremely limited number of ways. Little can be left to the discretion of the individual performing those tasks. In essence, then, Mr Mohammadi had next to no control over the "when", the "where" or even the "how" of the work, despite the fact that he was largely unsupervised. The one and only thing he offered the company was his physical ability to carry out the work on a daily basis. That, in my view, brings Mr. Mohammadi within a class of individuals "who by reason of their economic dependence or lack of 'bargaining power' in the market place, might otherwise have to work on terms below the basic minima established in the Act."[4]

22. Although the company did not participate in the hearing, it provided the Board with an excerpt from the Board's decision in *Clara-Ester Cleaning Services*, [2005] O.E.S.A.D. No. 7 (January 5, 2005) in support of its position that Mr. Mohammadi was an independent contractor. That case bears certain similarities factually to this one. The claimant in that matter responded to an advertisement seeking a person to clean two restaurants of a fast-food chain. The claimant received some training. There was some evidence to suggest that she signed a subcontract agreement, although the Board made no conclusive finding to that effect, and none of the terms of the subcontract are disclosed in the decision. Like Mr. Mohammadi, the claimant in the *Clara-Ester* case was paid a flat monthly rate (minus any missed shifts), and was required to do the cleaning seven days a week, unsupervised, at night while the restaurant was closed. None of the usual statutory deductions were made from her pay. The claimant was not restricted in working elsewhere.

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[4] *Majestic Maintenance Services Limited*, E.S.C. 479, February 8, 1977 (Burkett), page 18. This is essentially the articulation of the statutory purpose test referred to in *Re Eiler, supra*.

23. The Board applied the four-fold test and the organization test, and concluded that the claimant was not an employee within the meaning of the Act. In applying the four-fold test, the Board concluded that the application of the control criterion favoured a finding that the relationship was governed by a contract of service as opposed to a contract of employment. The Board appears to have taken this view because the claimant worked unsupervised, could choose her hours of work within the closing period, and, in theory at least, was free to work elsewhere. These factors are present in this case as well. However, I do not have to determine if I would come to the same conclusion in this instance, based on those factors alone, because in this case, there was additional evidence of control by Superior. It required Mr. Mohammadi to undertake his duties with diligence and care and with regard to the cleaner's checklist, using safe footwear. Moreover, Mr. Mohammadi was required by Superior to avoid any potential behaviour that might offend the Swiss Chalet client, and to be available by telephone to Superior at all times of the day. In my view it would be illusory to suggest that Mr. Mohammadi had any real freedom of choice regarding his hours of work when the work had to be completed within a certain, limited time frame. Furthermore, the fact that the work is unsupervised ignores the reality that the work itself lacks any complexity, and that its quality can be easily assessed upon completion.

24. In applying the organization test in the *Clara-Ester* case, the Board concluded that the claimant was not integral to the cleaning company's business because she worked in isolation and had virtually nothing to do with the business other than cleaning the two restaurants. The same is true in this matter. Mr. Mohammadi worked in isolation, in only one of apparently many of Superior's client locations. However, in this instance, I cannot accept the conclusion that Mr. Mohammadi was not integral to the business of Superior. Superior is in the commercial cleaning business. Mr. Mohammadi performed cleaning duties for one of the company's commercial clients. In my view, it matters not that he did so in isolation, or that he carried out those duties in only one of many of Superior's client locations. The work he did was unequivocally the manifestation of Superior's business, and as such, he was an integral component of that business.

25. I further rely on the statutory purpose test described in the *Majestic Maintenance* decision, and the dictum of the Supreme Court of Canada in the *Sagaz Industries* decision. The principles in those cases support the view that Mr. Mohammadi ought to be considered an employee within the meaning of the Act. He is a person whose economic dependence upon Superior and whose lack of bargaining power the Act was intended to protect. By no stretch of the imagination can he be described as a person who is in business on his own account.

26. For these reasons, I find that Mr. Mohammadi was an employee of Superior.

27. Mr. Mohammadi worked approximately one-third of a month. The monthly rate was $1,300. He is entitled to one-third of $1,300 ($433.33), plus vacation pay of 4 per cent ($17.33): $450.66.

28. I order Superior to pay forthwith to the Director of Employment Standards in trust wages in the sum of $450.66 for distribution to Mr. Mohammadi. If Superior fails to pay the wages within ten days of the date of this decision, it is required to also pay forthwith to the Director administrative costs of $100.

0003-07-R; 0399-07-R Mathieu Caron et al., Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 93, Responding Party v. **Swing N Scaff Inc.**, Intervenor

Bargaining Rights – Construction Industry – Employer Initiation – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on *Tenaquip Ltd.* that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Mathieu Caron* appeared on behalf of the applicants; *Melissa Kronick* and *Franklin DaSilva* appeared on behalf of the responding party; *Patrick Deschamps* appeared on behalf of the intervenor.

DECISION OF THE BOARD; December 11, 2007

1. These are applications in the construction industry filed under section 63 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") for a declaration that the responding party no longer represents the employees of Swing N Scaff Inc. ("the employer" or "the Company") in bargaining units for which it is the bargaining agent.

2. Board File No. 0003-07-R was filed on March 30, 2007 ("the First Application"). Board File No. 0399-07-R was filed on April 27, 2007 ("the Second Application"). The First Application is with respect to the bargaining rights held by the responding party, United Brotherhood of Carpenters and Joiners of America, Local 93, ("the union") in the industrial commercial and institutional ("ICI") sector of the construction industry; the Second Application is with respect to both the union's ICI bargaining rights and its non-ICI bargaining rights.

3. There are two outstanding issues in these applications. The first issue concerns the union's contention that both of these applications should be dismissed under subsection 63(16) of the Act on the ground that the employer initiated them. The employer's principal, Patrick Deschamps, is one of the applicants in the First Application, which as noted by the Board

(differently constituted) in its decision dated June 6, 2007 in this matter, is a fact that strongly suggests that the employer initiated the application.

4. The second issue concerns the outstanding status disputes in these applications. In both applications, the status of the following three individuals is in dispute: Emmanuel Caron, Mathieu Caron and Yannick Denis. In both applications, these individuals are challenged by the union on the basis of its claim that they did not perform bargaining unit work for the majority of the time on the date of application.

5. The Board heard evidence from three witnesses: Mr. Patrick Deschamps, the owner and President of the Company, Mr. Franklin DaSilva, a senior representative of the union, and Mr. Mathieu Caron, an applicant in both applications.

Factual Background

6. The union was certified on October 26, 2006 to represent employees of the Company in both the ICI sector of the construction industry and in all other sectors in Board Area 15. None of the three employees whose status is in dispute in these applications were members of the union at that time. Following certification, the union accepted them into membership and also accepted into membership Mr. Deschamps and Mr. Jean-François Lamont, another employee of the Company.

7. Mr. Deschamps candidly acknowledged in his evidence that he had been unhappy with the union starting from the time the certification application was filed. He also explained that he understood from the lawyer he retained to handle the certification application that the only way the employees could decertify the union is by an application filed by them and that he could not be involved.

8. Shortly after the Company was certified on October 26, 2006, Mr. DaSilva held an orientation meeting with the employees, at which time he provided each of them with a copy of the union's Provincial Collective Agreement. Sometime thereafter, Mr. Lamont withdrew from membership. According to Mr. DaSilva, it was apparent to him that Mr. Lamont was not in favour of joining the union from the beginning. Mr. Deschamps also expressed to Mr. DaSilva right from the beginning that the union was not good for his company.

9. Mr. DaSilva heard nothing further from the employees of the Company after the orientation meeting. None complained to him about the union or the fact that they were not getting any work.

10. Mr. DaSilva did however hear from Mr. Deschamps. On or about March 17, 2007, Mr. DaSilva spoke to Mr. Deschamps over the telephone. Mr. Deschamps recalls that it was Mr. DaSilva who called him whereas Mr. DaSilva recalls that Mr. Deschamps phoned him. In either event, during their telephone conversation, Mr. Deschamps expressed to Mr. DaSilva that the men were not happy because they were not getting that much work installing scaffolding. Mr. DaSilva was under the impression that the men were not working at all, which was not in fact the case. Mr. DaSilva therefore responded by stating that if the men wanted to work there was work for them elsewhere until the Company had work. At that point, Mr. Deschamps got upset at the suggestion that the union would send his men to a competitor. He explained to Mr. DaSilva

that the men were still working in the Company's shop and were also doing other things besides installing scaffolding. The union did not ultimately refer any of the Company's employees to work elsewhere.

11. Shortly after this telephone conversation, Mr. Deschamps came over to the union office to meet with Mr. DaSilva personally. Mr. Deschamps was angry and expressed his disappointment that the union was trying to steal his men away after he spent time training them. Mr. Deschamps testified that he was really mad at that time and he discussed with Mr. DaSilva the fact that he was not getting any union contracts. Mr. Deschamps agreed that by March 30, 2007, the date on which the First Application was filed, he did not want the union to represent his employees as he was really disappointed in the union by that time. Mr. Deschamps also acknowledged that there was a possibility he made some comments about the union to the employees and that the employees probably heard him say that he was really disappointed in the union.

12. Mr. Caron testified that he had decided to file the application at or around the same time that Mr. Lamont withdrew from membership with the union. Mr. Caron indicated that he researched how to go about it with the help of his girlfriend and of a friend. According to Mr. Caron and Mr. Deschamps, Mr. Caron and the other two employees whose status is in dispute in this proceeding spent the majority of their time on March 30, 2007 installing scaffolding at the National Gallery in Ottawa.

13. Mr. Caron acknowledged having made a lot of mistakes when he filed the First Application. He testified that his first error was putting the name of Swing N Scaff as the applicant and another error was when he indicated that the place of work was the shop even though the employees in question had worked at the National Gallery on the date of the application. The First Application also listed Mr. Patrick Deschamps among others under paragraph 1 a) as one of the applicants and included Mr. Deschamps' name and signature on the petition that was filed with the First Application.

14. According to Mr. Caron, he asked Mr. Deschamps to sign the petition indicating that he no longer wished to be represented by the union because Mr. Deschamps is a union member and Mr. Caron believed that the more names that appeared on the petition the better. Mr. Caron did however note on the petition that Mr. Deschamps would not participate in the vote, because Mr. Deschamps was in a conflict of interest. Mr. Caron testified that he had discussed the fact that Mr. Deschamps was in a conflict of interest with Mr. Deschamps as well as with Mr. Charles Legault, one of the Company's supervisors who does job quotations, before Mr. Caron drafted the petition.

15. Mr. Deschamps testified that he had not discussed the fact that he had a conflict of interest with Mr. Caron, but had discussed this fact with Mr. Lamont at least three weeks prior to March 30, 2007. According to Mr. Deschamps, Mr. Lamont had called the labour board to get a package to decertify the union and Mr. Lamont as well as some other employees (Mr. Deschamps could not recall precisely which other employees were present) had questions they wanted to ask Mr. Deschamps about the application. According to Mr. Deschamps, he told Mr. Lamont and the other employees present that he could not get involved in any of the demands they were going to make.

16. Mr. Deschamps testified that the employees told him at or around this same time that they had received a package from the labour board and had worked on it for a while before realizing that they had received the wrong forms. Mr. Deschamps acknowledged that he had allowed the employees to obtain the correct forms and the information bulletins off the internet from the computer located in the main work area of the office. Mr. Deschamps testified that he did not tell any of the employees that they could not use the Company computer, fax machine and telephone to prepare the applications, since the employees know they have the right to use this equipment for personal reasons. The Company's policy is to allow the use of its equipment for personal reasons during employee breaks provided the employees do not "exaggerate" or use the computer to access porn sites.

17. Mr. Caron similarly indicated that all employees have the right to use Company equipment for their own purposes provided they do not abuse the privilege. Mr. Caron did not recall getting a package from the labour board in the mail. He did recall getting the information to file the application off the internet and acknowledged using the Company computer, facsimile machine and telephones when preparing both applications. The petition for the First Application was however typed on his girlfriend's computer. He and his brother, Emmanuel Caron, Yannik Denis, and Mr. Caron's girlfriend chose the words.

18. Mr. Caron testified that he arrived at the Company's office sometime between 6:45 a.m. and 7 a.m. on March 30, 2007 and that he had Mr. Deschamps sign the petition for the First Application early that morning before punching in at 7:30 a.m. Mr. Deschamps did not recall when he signed the petition, but agreed that it was presented to him at the office. Mr. Deschamps, who is bilingual, roughly translated in his evidence his understanding of what the petition drafted in French said:

> We are the unionized employees of Swing N Scaff. For different reasons we want to exercise our right to de-unionize. We don't want local 93 to represent us. It is to be noted that Patrick Deschamps is an active member of the union and is also our employer. Because he is in a conflict of interest, he will not vote. There was another employee, Jean François Lamont, that was in the union but he decided not to be part of the unionized group. He gave his resignation at the union in February. This demand was accepted.

According to Mr. Deschamps, he signed the petition on March 30, 2007, because he agreed with what was written on it. That is, he is a member of the local and when there is a vote he will not vote.

19. Mr. Caron could not recall when he and the other employees had signed the petition. Although he initially suggested in his evidence that they had signed it at his girlfriend's house the same evening they typed it, he later agreed that they had all likely signed it on March 30, 2007 since that is the date written beside all of the signatures. He testified that he had signed it before the other two employees and did not believe that he was present when the other two signed it. He could not recall how the petition got to them, but speculated that he had passed it to them or that one of the two of them had passed it along. He then testified that he had passed the petition to his friend, Philippe Plouffe, an employee of the Company who works in the shop, and that his friend had passed it to the other two. According to Mr. Caron, Mr. Deschamps was the one who passed it back to him.

20. Mr. Caron's evidence concerning how the First Application was filed with the Board was clear and consistent throughout. According to Mr. Caron, he left the National Gallery job site at approximately 3:10 p.m. and drove directly to the Post Office in the same vehicle with Emmanuel Caron and Yannik Denis before going back to the shop. According to Mr. Caron, he was the one who paid for the postage for the package that was sent to the Board. Mr. Caron noted that he punched out when he got back to the shop and that he had therefore been paid for the time he had taken to go to the Post Office to send the application to the Board.

21. By contrast, Mr. Caron's evidence concerning how the First Application was delivered to the union on March 30, 2007 was entirely unclear. Mr. Caron initially stated that he had taken the application to be delivered to the union to the Post Office between 3:10 p.m. and 3:30 p.m. on March 30, 2007. He was however unable to explain why the union received the documents earlier that day between 11:30 a.m. and 12:00 p.m. from a courier company named Dynamex. He then indicated that he was certain that he gave the documents to the Post Office, but explained that he had called the Post Office the day before on March 29, 2007 so that they would come to pick up the documents on March 30, 2007 in the morning. He also explained that he did not know if the Post Office came to pick them up or not, since he had already gone to the job site.

22. Later in his evidence, Mr. Caron indicated that he had not in fact taken the package to the Post Office. He did so after looking at the Certificate of Delivery, which he had signed and which states that the package was delivered to the union by courier sent at 12:00 p.m. on March 30, 2007. He explained that he had been confused because there were two different applications. He indicated that he was not the one who gave that package to the courier at or around noon, since he had already left the shop to go to the job site. He had instead left instructions for everyone in the office (other than Mr. Deschamps who, according to Mr. Caron, had other things to do) to give the package to the courier when the courier arrived. He left the package in the office of Louis, the shop boss, with instructions for everyone present, including Louis, to give the package to the courier. Mr. Caron testified that the signature on the courier receipt was his, but that the rest of the writing on it was not his writing.

23. When Mr. Caron's cross-examination continued the next day, Mr. Caron again changed his evidence concerning how the First Application was sent to the union. According to Mr. Caron, he had made a mistake the previous day when he indicated that he had left the package at the office and that he learned of this mistake when he talked to his friends the evening before about it (notwithstanding that he had been cautioned not to speak to anyone about his evidence). According to Mr. Caron, his friends swear to him that he was the one who gave the package to the courier on March 30, 2007. This time, Mr. Caron stated that he gave the package directly to the courier and that he had paid the individual from the courier company.

24. This last version of events is however entirely inconsistent with Mr. Caron's other evidence regarding what he did that day, since he claims that he left the shop to go to the National Gallery job site shortly after punching in at 7:30 a.m. and that he did not return to the shop until after going to the Post Office between 3:00 p.m. and 3:30 p.m. It is not therefore clear how he could have been at the Company's office or shop to give the package to the courier that morning when he claims to have been at the National Gallery job site all day.

25. It seems likely that Mr. Caron initially confused the package sent to the Board with the package sent to the union when he stated that he had brought the package for the union to the Post Office between 3:10 and 3:30 p.m. In all the circumstances, the Board finds that Mr. Caron's second version of how the package was delivered to the union is what, in fact, occurred. That is, he left the package for the union in the shop supervisor's office to be picked up by the courier. In this respect, the Board notes that, when Mr. Caron gave this evidence, he appeared to recall distinctly leaving a package in Louis' office with instructions for everyone present to ensure that it was sent when the courier arrived. Further, he did not at any point suggest that it was a different package (e.g. one related to the Second Application) that had been left for pick-up in Louis' office.

26. After receiving the union's response to the First Application and the Board's first decision in that application, Mr. Caron and Mr. Deschamps learned that it was not yet timely to bring a decertification application in respect of the union's bargaining rights in the non-ICI sector. Mr. Deschamps testified that he "had no clue" at the time the First Application was filed when it was "open" for the employees to bring a decertification application. At that time, he believed that employees could bring a decertification application at any time. Mr. Deschamps testified that, after receiving "the papers" back from the union and the Board concerning the First Application, he was confused about the timeliness issue and he called the labour board "since this will affect [his] company."

27. It is not clear from the evidence when Mr. Deschamps learned that a decertification application in respect of bargaining rights held by the union in the non-ICI sector would only be timely after 6 months had elapsed from the date of certification. In this case, that would have been after April 26, 2007 (being six months after the certificates were issued on October 26, 2006). It is however clear that Mr. Caron never understood this. Mr. Caron testified that he understood that a decertification application in respect of the non-ICI sector would only be timely 6 months after the First Application was filed.

28. Given his mistaken understanding in this regard, it is somewhat curious that he filed the Second Application on April 27, 2007, which was less than a month after the first one was filed and as soon as it was, in fact, timely to do so in respect of the non-ICI bargaining rights. Mr. Caron also did not know where he had obtained the date of October 26, 2006 (being the date the union was certified) that he had noted at paragraph 6 of the Second Application and he did not know to what that date referred and could not recall why he put it there. Mr. Caron could not further explain why he had not filed the application on April 20, 2007, the day that the second petition was signed, or why the application was not filed on any day from April 20 to 26, 2007. Mr. Caron also could not remember what happened to the Second Application and to the petition that was signed by the employees on April 20, 2007 between that date and April 27, 2007, the date they were filed with the Board. He speculated that he either had the documents at home in that period or that they were in his locker at the shop.

29. According to Mr. Caron and Mr. Deschamps, Mr. Caron and the other two individuals whose status is in dispute worked on a residential job site that day installing scaffolding for the majority of their time on April 27, 2007. Mr. Caron testified that he used the First Application as a guide when preparing the Second Application but was not going to make the same mistakes twice. This time, Mr. Deschamps' name did not appear on the second petition and he was not named on the application as an applicant. According to Mr. Caron, he prepared the Second

Application with the help of his girlfriend and three of his friends, being Yannik Denis, Emanuel Caron and Philippe Pflouffe.

30. Mr. Caron testified that he was certain he did not prepare that second petition himself, since he would remember it if he had. He believed it could have been Yannik Denis, Emmanuel Caron, Philippe Plouffe or his girlfriend who prepared it. Mr. Caron testified that he did sign it, both beside his name and at the bottom. Mr. Caron acknowledged that he and the others likely signed it on April 20, 2007, since that is the date that appears on the document beside the signatures. Mr. Caron could not recall who gave him the typed petition to sign. He also testified that he was not present when the others signed it.

31. Mr. Caron did not initially recall how the Second Application was sent to the Board and he did not know how the Company's secretary (who is also Mr. Deschamps' secretary), from whom he obtained the Post Office receipt relating to the delivery to the Board, had obtained that receipt. He simply explained that all papers go back to her. Mr. Caron did not further remember how the Second Application was delivered to the union. On the next day of hearing, Mr. Caron testified that his friends (who did not testify) had helped him remember that he and Philippe Plouffe had taken the Second Application to the Post Office to be delivered to the Board and that Philippe Plouffe had come with him, since Philippe Plouffe, unlike Mr. Caron, speaks English.

Allegations under section 63(16) of the Act

32. Subsection 63(16) of the Act gives the Board the discretion to dismiss a termination application where it has been initiated by the employer. That provision reads as follows:

> **63.** (16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

In the present case, there is no suggestion of any threats, coercion or intimidation in connection with either termination application. Instead, the union's contention is that the employer initiated both applications within the meaning of subsection 63(16) of the Act and that accordingly they should be dismissed without regard to the representation vote.

33. In *Tenaquip Ltd.*, [1997] OLRB Rep. July/August 742, the Board discussed the type of evidence that will be required to establish initiation by the employer. In that decision, the Board reviewed the purpose of the discretion granted under subsection 63(16) and the type of conduct that amounts to initiation. In doing so, the Board refers to the following explanation set out at para 108 and 109 of *Bytown Electrical Services Ltd.*, [1996] OLRB Rep. Sept./Oct. 721:

> 108. Under subsection 63(16) of the Act, if a termination application is initiated by the employer, the Board has a discretion to dismiss it. The reason for this provision is that if a decertification application is really caused by or originated by the employer, and it is not primarily the conception of the employees who made the application, then it represents an improper interference by the employer in an area which should properly be within the exclusive terrain of the employees. Initiation involves causing, originating or facilitating, the beginning of a process or event. What

> meaning should the concept, 'initiation', be given in the context of section 63 of the Act? Plainly if an employer prepares a petition to terminate a union's bargaining rights, summons his/her employees and requires then (sic) to sign the petition and then requires an employee to initiate a termination application, the employer initiates the decertification application. But that is an extreme and, hopefully, rare manifestation of improper employer interference in the contemplated process of employees freely deciding of their own initiative that they no longer wish to be represented by a particular, or perhaps any, trade union. Such direct, palpable initiation will in all likelihood be an unusual occurrence. But initiation can also occur indirectly, less palpably than in the example suggested, though no less effectively. There are gradations of employer conduct in relation to a termination application, along a spectrum, part of which will be improper and part of which will be acceptable behaviour. The Act determines that when an employer "initiates" a termination application, the Board has a discretion to dismiss the application. There is a continuum of employer conduct, some of which will amount to 'initiation' some of which will not. How then is the distinction to be drawn?
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> 109. We consider that the proper interpretation of the notion of "initiation" is to determine whether the employer's conduct amounted to significant or influential employer involvement giving rise to the termination application. In other words, if the application is founded in the conduct of the employer, then it can reasonably be concluded that the employer has initiated that application.

The Board therefore assesses the extent to which the employer's conduct gave rise to or influenced the filing of the application in determining whether there has been employer initiation in a given case. Even though the onus is clearly on the union to establish employer initiation, circumstantial evidence may be sufficient to lead to an inference of improper employer involvement given the difficulty the union faces in establishing employer interference through direct evidence.

34. In the present case, it is apparent from all of the evidence that, by March 2007 when the First Application was filed, Mr. Deschamps, the principal of the Company, was decidedly unhappy about the fact that his company had been certified the previous fall. In particular, he complained about the fact that he was no longer able to compete for contracts to install scaffolding because of the union rates. He made this complaint to the union's representative a few short weeks before the First Application was filed and he was angry with the union at that time for suggesting that it may assign his employees to work elsewhere after he had invested in training them over the winter months. Mr. Deschamps acknowledged that the employees may have heard him express disappointment in the union during this period of time.

35. During his testimony. Mr. Caron echoed Mr. Deschamps' dissatisfaction with the union and testified that he believed he would be better off if the union were decertified. He also acknowledged that he knew prior to filing the First Application that Mr. Deschamps did not like the union. Mr. Caron testified that he had decided to seek to terminate the union's bargaining rights at or around the same time that Mr. Lamont had resigned from membership. He did not however explain what had prompted him to do so at that time or how he knew that the procedure for doing so was through an application to the Board. Mr Caron stated only that he had researched how to file the termination application after he decided to decertify the union.

36. Mr. Deschamps did however know from the lawyer he had retained months earlier in connection with the certification application that the way to decertify the union was through an application filed by the employees with the Board. Having regard to all the evidence, it seems likely that when Mr. Deschamps expressed his discontent with the union in or around early March 2007 and his view that the Company was no longer able to compete for scaffolding contracts, he also informed the employees of what his lawyer had said. That is, that a decertification application had to be brought by the employees and that he could not be involved. It seems likely that this is what prompted Mr. Caron and the other employees to research how to file such an application. Mr. Deschamps, in fact, acknowledges speaking to the employees about the decertification application before it was filed and telling them that he could not be involved. I conclude from all of the surrounding circumstances that Mr. Caron would not likely have brought the application without Mr. Deschamps having suggested it to the employees.

37. The situation in the present case is therefore similar to that before the Board in *Maple City Electric*, [2002] OLRB Rep. May/June 411, wherein the Company's principal had also signed the petition filed with the application and the evidence indicated that the Company's principal wanted to end his company's relationship with the union in the period prior to the filing of the application. In that case, the Board drew an inference from the evidence that the employer's principal "planted the seed that was then nurtured by [the applicant]". In that case, like the present one, the employees worked in a small office where the principal of the Company worked closely with the employees. In these circumstances, the Board found it reasonable to infer that the principal's dispute with the union would likely be common knowledge and that the applicant would not likely have brought the application without the Company's principal having suggested it. Similarly, in the present case, Mr. Deschamps acknowledged that, in the period prior to the filing of these applications, the employees probably heard that he was really disappointed in the union. Mr. Caron in fact acknowledged that he was aware of this and Mr. Caron did not make clear what had prompted him in or about March 2007 to research how to file a termination application.

38. In any event, the fact that Mr. Deschamps was one of the individuals whom Mr. Caron identified in the First Application as one of the applicants also raises an inference that Mr. Deschamps was promoting the filing the termination application by his employees. Mr. Caron explained only why he had gotten Mr. Deschamps to sign the petition filed with the First Application (i.e. because he believed that the more names on a petition the better). He did not explain why he listed Mr. Deschamps as one of the applicants at paragraph 1 a) of the application or why he had listed Swing N Scaff as the applicant in the style of cause.

39. Other evidence also suggests that the First Application is best characterized as a group effort by management and employees alike. For example, the employees were apparently unconcerned about delivering the First Application to the Post Office before punching out on March 30, 2007 such that they were paid for the time that they went to the Post Office that day. Mr. Caron also used the shop supervisor's office to make his phone calls to the Board and asked the shop supervisor to leave so that he could do so. Yet, according to Mr. Deschamps' evidence, employees wishing to make personal telephone calls can use the telephone in the board room and close the door. In addition, Mr. Caron's evidence that he had left the application to be delivered to the union in the shop supervisor's office with instructions for everyone, including the shop supervisor, to ensure that the package was sent also suggests that the First Application was a group effort supported by management.

40. It is also possible that Mr. Deschamps' signature was on the first petition before some of the employees signed it and that Mr. Deschamps may even have been involved in circulating it. Mr. Caron recalls asking Mr. Deschamps to sign the petition early in the morning on March 30, 2007 before Mr. Caron punched in at 7:30 a.m. and all of the employees signed it sometime that same day. Mr. Caron was not the one who circulated the petition and he could not recall when the others signed it. Mr. Caron did recall that it was Mr. Deschamps who passed the petition back to him after everyone had signed it.

41. The fact that the petition that was drafted clearly indicated Mr. Deschamps' wish to decertify the union and contemplated that he would sign it below the names and signatures of the other employees is particularly problematic in view of the responsive nature of the employment relationship. In *Tenaquip Ltd.*, cited above, the Board explained the rationale for this as follows:

> 23. It is also useful to consider why, from a labour relations perspective, employer initiated termination applications under section 63 are to be viewed with considerable scepticism. An obvious explanation was adverted to in the *Bytown* decision (cited earlier) which described such conduct as an "improper interference in an area which should properly be within the exclusive terrain of the employees".
>
> 24. There are two independent aspects to this explanation. First, the choice of whether or not to be represented by a trade union is and ought generally to be a collective and exclusive choice of affected employees. On that basis, employer interference in such a choice may well be improper.
>
> 25. But there is another and, for our purposes, perhaps more significant aspect to the impropriety of employer involvement in termination applications.
>
> 26. This Board has historically been acutely sensitive to the delicate and responsive nature of the employment relationship. As the Board observed over four decades ago in the oft cited case of *Pigott Motors*, 63 CLLC 16,264:
>
>> In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself or herself with the interests and wishes of his employer, an employee is obviously particularly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

In the present case, the employees knew at the time they signed the petition on March 30, 2007 that Mr. Deschamps had either already signed the petition indicating that he wanted to decertify the union or he would be asked to sign it below their own typed names and signatures. Given the natural desire of employees to want to identify themselves with the interests and wishes of their employer, the fact that the petition contemplated that it would be signed by the Company's principal raises questions as to whether it reflects the exclusive choice of the employees affected. In all the circumstances, the Board concludes that the evidence before it taken as a whole raises a reasonable inference that there was improper employer involvement in the First Application.

42. The union argued that the Second Application should be seen as a continuum of the first one such that the Board should infer improper employer interference with that one as well and, in this respect, relied on the decision in *Woollatt Employees v. Labourers' International Union of North America*, 2002 CanLII 27706 (ON L.R.B) (February 4, 2002). The Board agrees. It is difficult to imagine that the employees who signed the second petition on April 20, 2007 would not have been affected by their knowledge that their employer, Mr. Deschamps, was listed on the first petition less than a month earlier as someone who sought to decertify the union.

43. The Board, in any event, finds that improper employer interference in connection with the Second Application can reasonably be inferred from Mr. Caron's lack of any real knowledge concerning how that application and the second petition were drafted, how the application was sent to both the Board and the union, and the reason why it was sent on April 27, 2007. The situation in the present case is therefore to some extent similar to that in *Woollatt Employees v. Labourers' International Union of North America*, cited above. In that case, the Board noted that the applicant had a very limited understanding of the application process for seeking a declaration that the union no longer represents the employees of the employer and had testified that he relied on his friend to prepare the petition and the application. As noted by the Board in that case, "[b]y not producing the friend as a witness the applicant takes a risk as to inferences that may be drawn by the Board."

44. Similarly, in the present case, Mr. Caron was certain he did not draft the second petition and had no knowledge of when or how it was circulated to the other employees. He also did not know how the application was sent to the union and did not know, without consulting his friends, how it was delivered to the Board. He also could not explain what the October 26, 2006 date referred to or why he had noted it in the application. The evidence also makes clear that he had no understanding of when the Second Application would be timely in respect of the non-ICI sector or why it was filed on April 27, 2007. He believed that that Second Application would be timely in respect of bargaining rights in the non-ICI sector six months after the First Application was filed. That application was however filed less than one month later, which was as soon as it was, in fact, timely to do so.

45. In the Board's view, Mr. Deschamps' suggestion that Mr. Caron had simply forgotten these details because of the passage of time between the filing of the application and the dates of his testimony does not adequately explain his inability to address all of these issues. For example, the Board notes that Mr. Caron had no difficulty recalling driving to the Post Office on March 30, 2007 directly after leaving the National Gallery job site even though this occurred almost a month before the Second Application was filed. In addition, the Board does not agree that the number of mistakes in the First Application renders it implausible that management was involved in either application. Mr. Deschamps acknowledged that he "had no clue" when a termination application was timely until after receiving the Board's initial decision in the First Application. Mr. Deschamps also apparently did not realize that it was improper for him to sign the petition filed with the First Application.

46. Mr. Deschamps suggested that the employees who brought the termination application were not the same individuals who brought the certification application the year before and implied that it was therefore plausible that they wanted to decertify the union independent of any employer influence. In this regard, he referred to the Board's decision in *Swing Stage Equipment Rentals*, 2007 O.L.R.D. No. 2672 (June 15, 2007), which records that Mr. McCarthy, the inside

union organizer at Swing Stage in or about September 2006 had recently worked at Swing N Scaff. According to that decision, Mr. McCarthy testified in that proceeding that he was terminated from Swing N Scaff because of his association with the union.

47. However, regardless of how that certification came about, the fact is that Mr. Caron's evidence makes clear that he had considerable help particularly with drafting and preparing the Second Application. Although Mr. Caron suggested that it was one of the other employees and not management who was responsible for doing so, Mr. Caron could not even identify which one of the employees had done so. In all the circumstances, the Board draws an adverse inference of improper employer interference from the fact that no employee with knowledge of how the second petition and the Second Application were prepared and delivered to the union was called to testify.

48. The Board is satisfied that the intervenor initiated both of these applications within the meaning of section 63(16) of the Act. The Board has the discretion to dismiss an application where it is satisfied that it was initiated by the employer and ordinarily will do so unless there are compelling labour relations reasons not to do so (see *Tenaquip Limited,* cited above). As no compelling labour relations reasons exist in the present case, the Board, in the exercise of its discretion under subsection 63(16) of the Act, hereby dismisses these applications.

49. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

1234-06-PS Ontario Nurses' Association, Applicant v. **The Kensington Eye Institute**, Responding Party v. University Health Network, Mount Sinai Hospital; Sunnybrook Health Sciences Centre, C.U.P.E. Local 5001 and SEIU Local 1, Intervenors

***Public Service Labour Relations Transition Act* - ONA sought a declaration that s. 9 of the PSLRTA applied to the Kensington Eye Institute, a not-for-profit corporation licensed by the Ministry of Health and Long Term Care as an independent health facility – The Board found that the Institute was opened in January 2006 and the amendments to s. 9 of the Act that would be applicable to its operation were not enacted until March – Notwithstanding that the Institute was clearly part of the government's health restructuring strategy, the health services integration was an event that occurred prior to the amendments, therefore the Board found that the Act did not apply – Application dismissed**

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Caroline Cohen* and *Raymonde Boileau* for the applicant; *P. Christopher Lloyd, Ellen Swan, Tetyanna Tessolin* and *Juanita Strowbridge* for the responding party; *Heather Hinkson* and *Lola Pinnock* for SEIU Local l.on.

DECISION OF THE BOARD; November 20, 2007

1. This is an application under section 9 of the *Public Sector Labour Relations Transition Act, 1997* (the "PSLRTA").

2. This application arises out of the opening of the responding party ("KEI"), which the parties agree occurred on January 9, 2006. The applicant asserts that the opening of the KEI is an event to which the PSLRTA applies. KEI asserts that the application must be dismissed because s. 9 of the PSLRTA which arguably under the PSLRTA applies to events like the opening of the KEI, was amended to its present form only on March 23, 2006, after the responding party opened, and the old s. 9 would not have applied to the circumstances of the opening of the responding party.

3. The parties agreed to argue the issue as a preliminary matter and the Board held a hearing for that purpose. This decision determines that issue.

Background

4. The PSLRTA is legislation which applies to public service restructuring. Among other things, it is designed to, broadly speaking, establish a process through which the labour relations consequences of restructuring can be expeditiously resolved.

5. There have been a number of phases of public sector restructuring. The PSLRTA has occasionally been amended to accommodate new phases as necessary. The applicant asserts that the circumstances of this case fall under the most recent phase, that being the Health Services Integration phase. Among other things, the government's goal in this phase is to reduce wait times for care and increase expertise by creating centres of specialized health services. The Legislative vehicle to advance this goal is Bill 36, the *Local Health System Integration Act* S.O. 2006, Chapter 4, section 1, which received first reading in November 2005 and came into force on March 23, 2006.

6. Bill 36 amended the PSLRTA in several ways. The amendments to the PSLRTA taken by Bill 36 had two main effects. First, they expanded the scope of coverages of the PSLRTA to make the PSLRTA apply to any "health service integration" carried out by a health care provider or health care service providers. Second, the PSLRTA was also made to apply to "partial integration", a process in which health services migrate between health service providers that otherwise continue to exist in their original form.

7. In this case the health service provider, KEI is a not for profit corporation licensed by the Ministry of Health and Long-Term Care as an independent health facility. It was designated to perform certain cataract surgeries as part of the Ministry's strategy to reduce wait times for certain specialized surgical procedures, like cataract surgery. The KEI was created on April 7, 2005.

8. The KEI has three functioning operating rooms. Up to fifteen cataract surgeries are performed daily in each operating room. A fourth operating room will be opened in the future. The KEI will perform up to 12,000 surgeries per year when fully operational. It was expected to perform 6,700 routine cataract surgeries in 2007.

9. As a result of the opening of the KEI, St. Michael's Hospital, Mount Sinai Hospital, University Health Network and Sunnybrook Health Science Centre will (or have already done so) essentially cease performing simple cataract surgeries. Previously these Hospitals performed approximately 1700 such surgeries per year.

10. ONA holds bargaining rights for nurses at the four Hospitals. Some nurses left their employment at the Hospitals to work at KEI. KEI now employs 14 registered nurses and 4 registered practical nurses.

11. At Sunnybrook Health Sciences Centre, the two surgeons who perform cataract surgery at Sunnybrook each work one day per month at the KEI. As a result, the Ophthalmology Operating Room reduced its hours of operations from five days per week in the winter months to four days per week in the winter months, and from four days per week in the summer months to three days per week in the summer months. Nurses assigned to the Ophthalmology Operating Room are assigned to other Operating Rooms when the Ophthalmology Operating Room is not running.

12. Similar alterations in the provisions of services have been made at the other three affected Hospitals.

13. SEIU also represents employees at the Hospitals. In this application it adopts the arguments made by ONA.

14. Prior to the opening of the KEI, the Ophthalmology service at the four teaching hospitals performed a mix of simple and complex cataract cases. A complex cataract case is one where a dual procedure is performed: cataracts and another procedure. Since the opening of the KEI, almost no simple cases are being performed at the hospitals. The remaining patients at the hospitals are sicker, on dialysis, have complex medical problems and/or are frail and elderly. In essence, the most healthy patients are sent to the KEI.

15. As a result of the opening of the KEI, wait times for cataract surgery in the Toronto area have been reduced for both healthy and non-healthy cataract patients.

16. KEI argues that since it was opened before the PSLRTA was amended to apply to *Health Services Integrations*, then it can have no application to the facts of this case. Since there is no argument that the PSLRTA as it existed prior to the Bill 36 amendments would apply, then this application must be dismissed.

Decision

17. Prior to March 28, 2006 s. 9 of the PSLRTA stated:

> **9.** (1) The Board may by order declare that this Act applies as a result of,
>
> (a) the merger of all or part of the operations or administration of two or more employers who operate hospitals during the transitional period; or

> (b) a substantial restructuring of two or more employers who operate hospitals during the transitional period.
>
> (2) The order must specify which employers are the predecessor employers and which are the successor employers for the purposes of this Act.
>
> (3) *For the purposes of this Act, the changeover* date is the date on which the order is made, or such other date during the transitional period as the order may specify. The order may specify a date earlier than the date on which it is made.
>
> (4) An employer operating a hospital that may be the subject of an order or a bargaining agent that represents employees at such a hospital may request the Board to make the order.
>
> (5) The Board shall not make an order under this section except pursuant to a request under subsection (4).
>
> (6) When making an order under this section, the Board shall consider the following factors and such other matters as it considers relevant:
>
> 1. The scope of agreements under which services are shared by the participating hospitals.
> 2. The extent to which the participating hospitals have rationalized the provision of services.
> 3. The extent to which programs have been transferred among participating hospitals.
> 4. The extent of labour relations problems that have resulted or could result from the agreements, rationalizations or transfers.
>
> (7) This section does not apply with respect to an employer that is a municipality or local board or the Crown.

18. There was no definition of "Health Services Integration".

19. As of March 23, 2006, s. 9 of the PSLRTA states:

> **9.** (1) An employer that is or will be subject to a health services integration or a bargaining agent that represents employees of such an employer may request the Board to make an order declaring that this Act applies to the health services integration in question.
>
> **Board order**
>
> (2) The Board may by order declare that this Act applies to a health services integration if requested to do so under subsection (1).

Factors to consider

(3) When deciding whether to make an order under this section, the Board shall consider the following factors and such other matters as it considers relevant:

1. The scope of agreements under which services, programs or functions are or will be shared by employers subject to the health services integration.

2. The extent to which employers subject to the health services integration have rationalized or will rationalize the provision of services, programs or functions.

3. The extent to which programs, services or functions have been or will be transferred among employers subject to the health services integration.

4. The extent of labour relations problems that have resulted or could result from the health services integration.

Order – timing and terms

(4) The Board may make an order,

(a) before or after the health services integration in question occurs; and

(b) on such terms as it considers appropriate.

Predecessor and successor employers

(5) Subject to subsection (5.1), the Board shall specify in an order which employers are the predecessor employers and which are the successor employers for the purposes of this Act.

Crown not successor employer

(5.1) The Board shall not specify that the Crown is a successor employer. 2006, c. 35, Sched. D, s. 5 (2).

Changeover date

(6) For the purposes of this Act, the changeover date is,

(a) the date specified in the order, which may be a date earlier than the date on which the order is made; or

(b) if there is no date specified in the order, the date on which the health services integration takes effect.

20. In addition there is now a definition of health services integration in s. 2:

"health services integration" means an integration that affects the structure or existence of one or more employers or that affects the provision of programs, services or functions by the employers, including but not limited to an integration that involves a dissolution, amalgamation, division, rationalization, consolidation, transfer, merger, commencement or discontinuance, where every employer subject to the integration is either,

(a) a health service provider within the meaning of the *Local Health System Integration Act, 2006*, or

> (b) an employer whose primary function is or, immediately following the integration, will be the provision of services within or to the health services sector;

21. ONA argues persuasively that the KEI came into existence as part of the government's initiative regarding the improved delivery of health services through specialization and is an integral part of that strategy. It ought not to be divorced from the statute which gives labour relations effect to the transaction. In these circumstances, the PSLRTA should be interpreted to apply to it.

22. I have little doubt, based on the material filed, that the opening of the KEI was a part of the government's health strategy of encouraging specialization which led to Bill 36. The fact that Bill 36 was made law after the KEI opened could well be a matter of timing rather than a deliberate decision that Bill 36 was not to apply to the KEI.

23. Having said that, it is not the health strategy of the government the Board is concerned with. The Board receives its mandate and jurisdiction from statutes enacted by the Legislature. The way the Board receives this direction about the Legislature's intentions is through legislation.

24. The fundamental problem which the union faces in this case is that at the time the KEI was opened the PSLRTA did not apply. Moreover, at the time the legislation was passed the alleged health services integration had already occurred. Therefore, in order for the amended PSLRTA to apply it must be given retroactive or retrospective effect.

25. The difference between a retroactive and a retrospective statute was accurately set out in an article by E. A. Driedger, Statutes: Retroactive, Retrospective Reflections, 56 Canada Bar Review 264 [1978] wherein Mr. Driedger states at pages 268-269:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates* backwards. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

26. One of the basic rules in interpretation of legislation is that it is presumed not to apply retroactively. See: *Sullivan and Driedger Construction of Statutes* ((2002), Butterworths Toronto) at p. 553:

> It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of rule of law. As Raz points out, the fundamental principle on which rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not

> directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.
>
> For these reasons it is strongly presumed that legislation is not intended to be retroactive. As stated by Dickson J. in *Gustavson Drilling*:
>
> > The general rule is that statutes are not to be construed as having retrospective]i.e. retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the Act.

27. I am not here concerned with the presumption against the retroactive operation of a statute because there is no express requirement that the Board do so. The PSLRTA contains no provisions which indicate that it applies to a health services integration that occurs before proclamation. That is, the definition of "health services integration" does not specifically include an "integration" that occurs before proclamation. Furthermore, s. 9 does not specifically state that the "the Act applies to a health services integration..." *that occurs before proclamation*. Moreover, and more specifically, s. 9(2) does not state that the Board "may by order declare that this Act applies to a health service integration, where it occurs before or after the proclamation of the Act, if requested to do so....". Finally, there is no Regulation under the Act which requires that the Act apply to the KEI (as occurred with some other employers). The issue therefore becomes whether the presumption against retrospectivity applies.

28. In *W.G. Gallagher Construction Limited*, [1989] OLRB Rep. November 1191, the Board noted that the presumption against retrospective application of a statute did not always apply:

> 15. These two diverse submissions from each counsel highlight one of the "exceptions" to the presumption against retrospectivity, or more accurately stated highlight one of the situations in which it can be said that the presumption against retrospectivity does not arise. If the statute attaches to a "characteristic" rather than an "event", the presumption does not apply.

29. In *W.G. Gallagher Construction Limited*, the Board had before it a sale of business which occurred in 1957, that being before the sale of business/related employer provisions contained in what is now s. 69 or 1(4) of the Act were enacted. The union argued that s. 63 (now s. 69) or 1(4) ought to apply to the 1957 transaction. In rejecting the argument *vis a vis* s. 63 (now s. 69) the Board stated:

> 18. We do not agree with counsel's submissions. In our view, the provisions of the original section 47a (and the subsequent 47a as amended, section 55 and the current section 63) describe an event and not a characteristic. That event is the sale of the business. These provisions depend on the happening of that event. It is from that event that consequences flow. Although that event may, at least since 1963, result in the attainment of a status or a characteristic, (namely the status of being bound to recognize a trade union) in order for the successor employer provisions to have the effect which counsel urges upon us, that status or characteristic must have been acquired before the original section 47a was enacted *and* the status or characteristic must have existed at the time the successor employer provisions were enacted and the declaration sought.

> 19. In this case, when the law was enacted in 1963 it cannot be said that Gallagher Limited had the "characteristic" or "status" of a "successor employer" as that term is understood and applied in the Act. There was no such concept as the status or characteristic of being a "successor employer" in the *Labour Relations Act* sense of the word. That concept was new. At the time section 47a was enacted, the only "characteristic" which Gallagher Limited had, was the characteristic of being a business entity which several years earlier had acquired the assets and liabilities of W.G.G. To hold otherwise would undermine the very reasons for the presumption against retrospectivity as enunciated in *Philips v. Eyre, supra.* In order for the presumption against retrospectivity not to apply by reasons of the fact that the statute attaches to a characteristic and not an event, the characteristic, (in this case the characteristic of continuing to be bound to recognize a trade union) must have existed with Gallagher Limited at the time the enactment came into force.

30. In my view, the result in *W. G. Gallagher, supra,* which I agree with, is directly analogous to the facts before me. The opening of the KEI and the transfer of employees and work to it from the Hospital was an event. It is from that event which consequences flow. It is apparent that the PSLRTA, including s. 9, is concerned with events – public sector restructuring and health services integration. At the time of the relevant event, no consequences could flow under the PSLRTA because the amendments to s. 9 were not yet law. A health service integration is not a characteristic and, therefore, the exception to the presumption against retrospective application does not pertain.

31. ONA relies on s. 9(2) and (4) of the PSLRTA. It is clear, it argues, that under these sections, the Board can select a date to make an order that the PSLRTA applies even if that order is *after* the health services integration occurs.

32. ONA's argument that the Board can effectively choose any date it wishes is interesting. However, I am unable to accept it. ONA is not attempting to apply the PSLRTA "retrospectively" in the sense that Driedger applied that term (see *infra* at para 24). That is, there is more than an attempt to apply "new consequences" for the future to an event that took place before the statute was enacted. ONA is requesting that the Board reach back and declare a changeover date prior to the proclamation of the Act thereby changing past consequences. The problem is that at the time of the opening of the KEI the legal idea of health services integration did not exist as a statutory concept.

33. In my view the words in subsection 9(4) [providing the Board with the authority, on terms it considers appropriate, to make an order before or after a health service integration occurs] do not assist ONA. Those words have meaning without reaching back to a "health service integration" that occurred before proclamation. The section is clear that where the health service integration occurs on or after proclamation, the Board may make an order before or after the integration occurs. The Board has the authority to anticipate an integration, or to make an order after one has occurred, but only within a timeframe that commences with proclamation. Whether or not the terms of a Board order could apply to the time before proclamation (where the integration occurred after proclamation) is not an event I need decide. However, in my view, where the integration occurred before proclamation, very specific wording about the application

of the Act would be required before the Board could consider such an event, either retroactively or retrospectively; and that specific wording does not exist.

34. Finally, if ONA's argument were accepted, there would be nothing to prevent a union from making an application with respect to any transfer of services which had occurred at any point in the past.

35. For these reasons, I find that the PSLRTA does not apply to the opening of the KEI. The application is dismissed.

0848-07-R The Ontario Formwork Association, Applicant v. The Formwork Council of Ontario, Responding Party, v. Carpenters Employer Bargaining Agency, Intervenor No. 1 v. The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Intervenor No. 2

Accreditation – Construction Industry – Intervenor – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Carl Peterson* and *E. Arduinni* for the applicant; *A. M. Minsky, Rocco Lotito* and *Jaime Melo* for the responding party; *Ray Werry* and *Joe Keyes* for Intervenor No. 1; *Michael Church, Jesse Nyman, Ucal Powell* and *Bud Calligan* for Intervenor No. 2.

DECISION OF THE BOARD; December 4, 2007

1. This is an application for accreditation made pursuant to section 134 of the *Labour Relations Act, 1995*, c. 1, as am. (the "Act") in which the applicant seeks to be accredited as the bargaining agent for:

> all employers of employees engaged in concrete forming construction for whom the responding party holds bargaining rights in the Province of Ontario in the industrial, commercial and institutional sector and the residential sector of the construction industry.

2. The two intervenors seek standing in this proceeding on the grounds that they are directly affected by this application and therefore have a legal interest in this proceeding. They also ask for standing in the exercise of the Board's discretion under Rule 40.8 of the Board's Rules of Procedure. The applicant and responding party oppose the intervenors' participation in this proceeding and move to have their interventions struck and standing as parties denied.

3. Intervenor No. 1 is the designated employer bargaining agency that represents employers of employees for whom Intervenor No. 2 holds bargaining rights in the industrial, commercial and institutional sector of the construction industry.

4. The two intervenors are parties to the Carpenters' provincial agreement in which the first recital states:

> Whereas the EBA [Carpenters' Employer Bargaining Agency] is a designated employer bargaining agency and as such represents employers for whom the Union has bargaining rights for the purposes of entering into a Collective Agreement with the Union;

and in which the bargaining unit is described as follows:

> The EBA recognizes the Union as the sole and exclusive bargaining agent for all Journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the Union has bargaining rights.

Intervenor No. 2 represents employees who are journeymen and apprentice carpenters, other than millwrights, working in the industrial, commercial and institutional sector of the construction industry while the responding party represents all construction employees engaged in concrete forming construction without reference to sector.

5. The two bargaining units represented by the responding party and Intervenor No. 2 are discrete although some of the same work, that is, the carpentry portion of concrete forming construction, comes within the scope of both units. The employees in the "all employees" bargaining unit are represented by the responding party whereas the employees in the "carpenters" bargaining unit are represented by Intervenor No. 2. As the accreditation order sought by the applicant relates only to employers of employees for whom the responding party holds bargaining rights, such an order could not have an impact on the employers of employees for whom Intervenor No. 2 holds bargaining rights in relation to its collective bargaining rights and its collective agreement with Intervenor No. 1.

6. Intervenor No. 1 submits, and the applicant and respondent do not disagree, that some of the employers that come within the bargaining unit proposed by the applicant are also employers it represents in collective bargaining with Intervenor No. 2. Simply put, Intervenor No. 1 represents employers that are bound by the provincial ICI collective agreement between it and Intervenor No. 2. That collective agreement covers carpenters and carpenters' apprentices who work in the industrial, commercial and institutional sector of the construction industry for employers bound by that collective agreement. The bargaining unit proposed by the applicant encompasses employers of employees engaged in concrete forming construction for whom the

responding party holds bargaining rights. Carpenters are among the trades that perform concrete forming construction work, alongside rodmen, cement finishers and labourers. (Operating engineers are also involved in concrete forming construction, but that trade is not relevant to the issues raised by the intervenors.)

7. Intervenor No. 1 submits the employers it represents engage in concrete forming construction and employ carpenters and carpenters' apprentices represented by Intervenor No. 2 to do that work in the industrial, commercial and institutional sector. Intervenor No. 1 claims that because it represents employers performing concrete forming construction, some of which come within the bargaining unit proposed by the applicant, it has standing both as the representative of those employers and in its own right to ensure that the bargaining rights obtained through accreditation do not impinge on the bargaining rights it holds in the industrial, commercial and institutional sector of the construction industry.

8. The position of Intervenor No. 2 is similar to Intervenor No. 1. Intervenor No. 2 points out it is the designated employee bargaining agency for carpenters and carpenters' apprentices employed in the industrial, commercial and institutional sector of the construction industry. Some of its members working for the employers coming within the bargaining unit proposed by the applicant are also likely to be members of the responding party's constituent local unions. Intervenor No. 2 contends the proposed bargaining unit, by encompassing employers performing concrete forming construction in the industrial, commercial and institutional sector, would permit the responding party to not only represent carpenters and carpenters apprentices in that sector, which they can do now as a result of the Minister's designation, but would allow the responding party to encroach on its bargaining rights in that sector and the work its members perform in that sector under its collective agreement with Intervenor No. 1.

9. Intervenor No. 2 emphasizes that it holds bargaining rights for employees of a number of the employers that come within the proposed bargaining unit. It says the unit the immediate parties to this application are proposing has never been granted by the Board, and as such, there should be parties opposite in interest to the applicant and responding party to put forward the other side of the issues raised by this application. Intervenor No. 2 contends there is a tremendous potential for overlap of bargaining rights with the employers that are bound by its provincial ICI collective agreement and for which the responding party holds bargaining rights. It submits those employers had traditionally done concrete forming construction in the residential sector using the responding party's collective agreement with the applicant but have done concrete forming construction in the industrial, commercial and institutional sector under its ICI provincial agreement.

10. In order to determine whether either or both of the intervenors have standing, it is necessary to assess whether this accreditation proceeding could affect their rights under the Act or any collective agreements by which they are bound. At the outset, it must be emphasized that an accreditation application, unlike an application for certification, involves only employers of employees for whom a trade union or a council of trade unions holds bargaining rights. A certificate of accreditation neither creates bargaining rights for that trade union or council nor diminishes the bargaining rights of any other trade union.

11. Both the responding party and the applicant in this proceeding emphasized that the accreditation proceeding does nothing more than provide a statutory foundation for ensuring that all employers of employees for whom the responding party, that is, the Formwork Council of Ontario, holds bargaining rights, are bound by the same collective agreement. They say this accreditation proceeding cannot possibly affect either of the intervenors because the accreditation provisions of the Act limit the scope of any accreditation order to employers of employees for whom the responding party holds bargaining rights. Indeed, counsel for the applicant, in his submissions, stated that the applicant does not seek to represent employers that are bound by collective agreements with either or both of the intervenors. To be clear, where employers are already bound by a collective agreement with both the responding party and with either or both intervenors, the applicant will continue to represent those employers, but only in relation to the collective bargaining relationship between it and the responding party.

12. The intervenors seek standing because both the employees and employers they represent engage in concrete forming construction as do the employees represented by the responding party and the employers that are members of the applicant and would be encompassed by the accreditation order the applicant seeks. Although both the applicant and Intervenor No. 1 may represent some of the same employers and the responding party and Intervenor No. 2 may represent some of the same employees, the collective bargaining relationship between the applicant and responding party is separate and distinct from the collective bargaining relationship between Intervenor No. 1 and Intervenor No. 2. That is, while both collective bargaining relationships relate, in part, to the carpentry portion of concrete forming construction, the bargaining rights currently held by the applicant do not overlap with the bargaining rights held by Intervenor No. 1 and the bargaining rights held by the responding party do not overlap with the bargaining rights held by Intervenor No. 2.

13. It seems to me that underlying the intervenors' claim for standing in this proceeding is that in respect of the industrial, commercial, and institutional sector of the construction industry, they are the designated employer and employee bargaining agencies for journeymen and apprentice carpenters and for the employers of those carpenters. That designation is reinforced by section 158 of the Act that limits affiliated bargaining agents to obtaining bargaining rights for those employees who would be bound by their collective agreement. The relevant portions of the Minister's designation of the employee bargaining agency for carpenters (Intervenor No. 2) provide:

> Pursuant to clause a of subsection 1 of section 153 of the *Labour Relations Act, 1995*, I hereby designate the United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice Carpenters, other than Millwrights, represented by the following affiliated bargaining agents:
>
> [Unions omitted]
>
> ...in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, bargaining as aforesaid in relation to bargaining rights of the Unions or any of them and the performance of the work described in or covered by

> (a) certificates of the Ontario Labour Relations Board to the Union or any of them;
>
> (b) voluntary recognition agreements between the Unions or any of them and any employers;
>
> (c) collective agreements to which the Union or any of them or their predecessors have been or are party or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

The relevant portions of the Minister's designation of the Carpenters' Employer Bargaining Agency (Intervenor No. 1) provide:

> Pursuant to clause 153(1)(b) of the *Labour Relations Act, 1995*, I hereby designate the United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency, consisting of
>
> [Employer associations omitted]
>
> as the employer bargaining agency to represent in bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry in Ontario all employers whose employees are represented by,
>
> (g) United Brotherhood of Carpenters and Joiners of America; or
>
> (h) The Ontario Provincial Council of Ontario, United Brotherhood of Carpenters and Joiners of America; or
>
> [Unions omitted]
>
> and all employers bound by or parties to,
>
> (k) a certificate of the Ontario Labour Relations Board to the Unions or any of them;
>
> (l) a voluntary recognition agreement between the Unions or any of them and any employers; or
>
> (m) a collective agreement to which the Unions or any of them or their predecessors have been or are party to or bound by,
>
> covering the ICI sector of the construction industry in Ontario.

It is clear from the designations that the intervenors are designated to represent in the industrial, commercial and institutional sector of the construction industry individuals engaged in the carpentry trade who are carpenters or carpenters apprentices, and not millwrights, and who are represented by Intervenor No. 2 or an affiliated bargaining agent of Intervenor No. 2 and their employers.

14. But not all persons performing carpentry work or who are working in the carpentry trade are represented by the intervenors. Indeed, in *Ellis-Don Construction Ltd.*, [2004] OLRB

Rep. July/August 710 (July 21, 2004) the Board was dealing with an application by the Universal Workers' Union Labourers International Union of North America, Local 183 to displace the Carpenters Union as the bargaining agent for a bargaining unit of carpenters employed outside the ICI sector. Local 183 had claimed that the persons it dispatched to work for Ellis-Don were employed in the bargaining unit represented by the Carpenters Union since they were doing the same work as the employees in the bargaining unit and therefore were entitled to vote on whether all the carpenters working for Ellis-Don should be represented by Local 183 or the Carpenters' Union. The Board at page 720 wrote:

> In this case, the applicant seeks to displace the intervenor as the bargaining agent representing a bargaining unit comprised of carpenters and carpenters apprentices. Therefore, the only people who are eligible to vote on whether the intervenor or the applicant should represent the carpenters employed by the responding party are those individuals who, on the date of application, were represented by the intervenor and employed by the responding party in the bargaining unit represented by the intervenor. In the result, the persons who were dispatched by the applicant to work for the responding party are not eligible to vote. Only the individuals who were employed pursuant to the intervenor's Project collective agreement with the responding party and at work on the application date were employees in the bargaining unit the applicant seeks to represent.

In coming to that conclusion, the Board noted earlier that Local 183 had dispatched carpenters to work for Ellis-Don under the Heavy Engineering agreement. At page 719, the Board stated:

> It seems to me that the persons who were dispatched by the applicant to work for the responding party were, in fact, working pursuant to the HCAT Agreement by which the applicant and the responding were bound. The HCAT Agreement does contain the classification of "carpenter" but that does not mean, in my view, that the persons classified as carpenters under the HCAT Agreement who are dispatched to work for the responding party pursuant to that collective agreement to perform carpentry work are no longer in the HCAT Agreement bargaining unit represented by the applicant. Construction labourers and other persons represented by the applicant may perform work that is also performed by persons in other construction industry bargaining units. The overlap of work between bargaining units represented by different trade unions does not affect the scope or composition of the bargaining unit. The applicant represented persons performing carpentry work immediately before they were dispatched to work for the responding party. Their representation by the applicant did not change when they were dispatched by the applicant pursuant to the HCAT Agreement and began doing carpentry work for the responding party.

15. There is no doubt that persons represented by both Intervenor No. 2 and the responding party perform carpentry work and are engaged in the carpentry trade when doing certain aspects of concrete forming construction. Intervenor No. 2 is the designated bargaining agency for carpenters and carpenters apprentices. Nevertheless, under the Ministerial designation for construction labourers, concrete forming construction, when carried out in the industrial, commercial and institutional sector by employers and employees bound by the collective agreement between the applicant and responding party, is not subject to the provincial collective

agreements established under section 162. That is, the Ministerial designation excludes concrete forming construction from the single trade designation system.

16. The relevant portion of the Labourers' employee bargaining agency designation states:

> ...it should be noted that notwithstanding the fact that locals set out in paragraph 3 above are affiliated bargaining agents...certain of them have or may acquire bargaining rights, or are, or may become bound by, certain collective agreements affecting all sectors of the construction industry covering all employees engaged in concrete forming construction...whereby they represent employees who do not commonly bargain separately and apart from other employees. Therefore, with respect to bargaining on behalf of employees of members of the Ontario Form Work Association..., and such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction, such locals are not affiliated bargaining agents....
>
> ...I hereby exclude from this designation the bargaining relationship between the Formwork Council of Ontario and the Ontario Form Work Association.

The relevant portion of the Labourer employer bargaining agency designation provides:

> ...it should be noted that even though the locals...above are "affiliated bargaining agents"... certain of them have or may acquire bargaining rights, or are, or may become, bound by, certain collective agreements affecting all sectors of the construction industry covering all employees engaged in concrete forming construction...whereby they represent employees who do not commonly bargain separately and apart from other employees.
>
> Therefore, with respect to bargaining on behalf of employees of members of the Ontario Form Work Association..., and such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction, such locals are not affiliated bargaining agents...
>
> ...I hereby exclude from this designation the bargaining relationship between the Formwork Council of Ontario and the Ontario Form Work Association.

Thus, it is clear that the responding party can represent employees engaged in the carpentry portion of concrete forming construction in the industrial, commercial and institutional sector, and the applicant can represent employers of those employees working in that sector without affecting the bargaining rights of the intervenors.

17. There is also no doubt that some of the work covered by the provincial agreement between the intervenors will overlap with the carpentry portion of concrete forming construction work covered by the collective agreement between the applicant and the responding party. The fact that work done under the two collective agreements overlaps does not result in either extending or diminishing the bargaining rights of the parties to those collective agreements. In

Runnymede Development Corporation Limited, [1987] OLRB Rep. Oct. 1305, the Board commented on construction industry collective agreements where the work jurisdiction of different trade unions overlap in this way at page 1336:

> Unfortunately, the work jurisdictions of trades do overlap. In addition, as we have already noted, collective agreements in the construction industry often indicate the employees in the bargaining unit to which they apply in terms of the work they perform. As a general rule, there is no necessary congruence between the bargaining rights held by a trade union and its work jurisdiction. Consequently, a construction industry trade union does not necessarily have a general absolute right to a particular kind of work, even though that work may be performed by employees whom it represents (which in the construction industry usually means its members) pursuant to the terms of one or more collective agreements. The fact is that, in the construction industry, more than one trade union may have bargaining rights for employees who, though described in terms of different job categories, perform some of the same work….

The Board in *Ellis-Don Ltd.*, Board File No. 1754-95-JD, decision dated July 18, 1996, unreported, Q.L. cite [1996] OLRD No. 2395 put that same proposition succinctly at paragraph 49:

> Because the Labourers' or any other trade union performs work that is also performed by another trade union as part of its recognized work function it does not extend bargaining rights for this other trade or craft.

18. The applicant seeks accreditation in respect of the employers of employees for whom the responding party holds bargaining rights in the industrial, commercial and institutional sector as well as the residential sector. Those employers perform some carpentry work when engaged in concrete forming construction. Should the applicant be successful, the accreditation order would encompass all employers for whom the responding party, that is the Formwork Council of Ontario, holds bargaining rights in the industrial, commercial and institutional sector. I note, in that regard, an employer for which the Formwork Council of Ontario does not hold bargaining rights that is required to apply the terms and conditions of the Formwork Council of Ontario collective agreement as a result of a cross-over clause in a collective agreement with the Labourers' union by which it is bound, is not, when applying the terms and conditions of the Formwork Council of Ontario collective agreement, bound by it nor does that employer confer bargaining rights on the Formwork Council of Ontario when it applies that collective agreement. See *Runnymede Development Corporation Limited*, *supra*; *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720; *Fernbrook Homes Ltd.*, [2006] OLRD No. 3277 decision dated September 7, 2006, unreported. If the carpentry portion of concrete forming construction is carried on in the industrial, commercial and institutional sector by an employer bound by both the provincial collective agreement between the intervenors and the collective agreement between the applicant and the responding party, there would certainly be some overlap of work jurisdiction between the responding party and Intervenor No. 2. If that employer assigned the carpentry portion of concrete forming construction to the members of Intervenor No. 2 rather than to members of a constituent local union of the responding party, and the responding party sought to enforce its collective agreement, a jurisdictional dispute between the parties would be raised. That same result would follow if the situation were reversed and that employer assigned the carpentry portion of concrete forming construction to members of the responding party.

Intervenor No. 2 would seek to enforce its collective agreement and, once again, a jurisdictional dispute would be raised.

19. That situation exists at the present time, with several employers represented by Intervenor No. 1 and bound by collective agreements with Intervenor No. 2 that are members of the applicant and bound by the collective agreement between the applicant and the responding party. An accreditation order encompassing the industrial, commercial and institutional sector would, in my view, do nothing to affect that situation. The intervenors would therefore not be legally affected, nor would their bargaining rights be impacted by the accreditation order the applicant seeks encompassing an employer bound by both the intervenor's collective agreement and the collective agreement between the applicant and responding party.

20. In my opinion, the circumstances of the Intervenor No. 1 in this case are analogous, if not identical, to the circumstances of EPSCA in *Ontario Power Generation Inc.*, [2004] OLRB Rep. May/June 617 where the Board at page 626, after referring to the dismissal of an attempt by the Ottawa Taxi Owners and Brokers Association to intervene in a certification application filed in respect of an Ottawa taxi company (*Alpha Taxi Ltd.*, [1984] OLRB Rep. Feb. 165), wrote:

> That same rationale applies, in my view to EPSCA in relation to the two CUSW applications. While Bruce Power and OPG may be EPSCA members, EPSCA does not represent them in respect of their relationship with CUSW. Furthermore, the potential effect of certifying CUSW on members of EPSCA should a more restrictive subcontracting provision be inserted into the parties' collective agreement is not, in my view, a function of the certification proceeding. Rather, it is a matter of collective bargaining that will take place should CUSW be certified. While the terms of the collective agreement reached with CUSW may well have a very significant commercial interest to both EPSCA and its members, that commercial interest does not become a legal interest in the CUSW certification proceedings. Certification of CUSW cannot have a direct effect on EPSCA since EPSCA neither bargains with CUSW nor does it represent any of its members in respect of CUSW.

Similarly, the situation of Intervenor No. 2 is analogous, if not identical, to the situation of the Labourers' Union in *Trim Association of Ontario*, Board File No. 0170-02-R, decision dated January 20, 2003, unreported, Q.L. cite [2003] OLRD No. 178 in which the Board dismissed the attempt by the Labourers to intervene in an accreditation application made in respect of employers for whom the Carpenters Union held bargaining rights. The Board wrote at paragraph 7:

> Since LIUNA cannot, by definition, as it conceded, represent employers of carpenters for whom the responding party holds bargaining rights, no employer for whom it has bargaining rights comes within the bargaining unit claimed by the applicant to be appropriate. It is up to the immediate parties to the proceedings to attempt to agree upon the lists or for the Board to determine the composition of the lists. The claim for status made by LIUNA in this case is analogous to a third party union seeking to intervene in a certification application in order to protect its work jurisdiction when the work performed by the employees in the bargaining unit is work normally done by both the applicant union and the union seeking to intervene. If the

> union seeking to intervene does not represent an employee in the bargaining unit, then it does not have status to intervene.

21. Both intervenors cannot, in my view, be legally affected by this accreditation proceeding because the accreditation order is limited to the employers with whom the responding party has a collective bargaining relationship. If an employer is bound by both the collective agreement between the intervenors and the collective agreement between the applicant and responding party in the industrial, commercial and institutional sector, an accreditation order will not detract from the bargaining rights held by the intervenors nor will it add to the bargaining rights held by the applicant and responding party. More importantly, an accreditation order cannot expand the bargaining rights of the responding party. See *Platinum Drywall Limited*, [2002] OLRB Rep. Nov./Dec. 1149, in which the Board wrote at 1159:

> The purpose of accreditation is indeed to create a common bargaining pattern. It is not to extend the union's bargaining rights. One might usefully compare this to the history of province-wide bargaining in the ICI sector. In 1978 the Act was amended to mandate province-wide bargaining in the ICI sector. However, there was no extension of bargaining rights.

The Board then went on to explain how the Act was amended in 1979 by the addition of what is now section 151(2) of the Act to extend bargaining rights in the industrial, commercial and institutional sector of the construction industry across the province.

22. There is nothing in the accreditation provisions of the Act to expand the bargaining rights held by the responding party to a sector or area in which it does not hold those bargaining rights for an employer through certification or voluntary recognition. If the responding party seeks by certification or voluntary recognition to obtain bargaining rights for all employees of an employer engaged in concrete forming construction that is bound by the intervenors' provincial collective agreement, their interest in the certification proceeding or their standing to attack the voluntary recognition agreement would be much less remote then their interest is in this proceeding.

23. Accreditation cannot affect the intervenors' bargaining or legal rights in relation to employers who are already bound by both the Formwork Council of Ontario collective agreement and the intervenors' collective agreement. If, in the future, an employer bound by the intervenors' collective agreement is involved in an application for certification made by the responding party or purports to enter into a voluntary recognition agreement with the responding party, then the intervenors' bargaining and legal rights might well be affected, particularly if the carpenters employed by that employer are engaged in concrete forming construction in the industrial, commercial and institutional sector. Nevertheless, whether their interest would rise to a legal interest giving them standing in such a proceeding is a matter that would have to be determined should it arise. The accreditation order sought by the applicant cannot, in my view, affect the legal or bargaining rights of the intervenors. The intervenors do not have a legal interest in this proceeding and therefore do not have the right to intervene as parties.

24. The intervenors also sought standing on the basis of the Board's exercise of discretion. There is nothing special or unique about this accreditation proceeding that warrants intervention by parties without a legal interest in the matter. The intervenors relied on *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. 481; *Jaddco Anderson Limited*, [1996] OLRB Rep.

March/April 249, and *Ontario Power Generation Inc., supra* to argue that the Board should exercise its discretion to permit them to intervene so as to provide "the other side" of the case in respect of how labour relations in concrete forming construction in the industrial, commercial and institutional sector developed and currently exists.

25. There is, I believe, ample authority in the Board's jurisprudence to permit a good understanding of how the two parallel collective bargaining frameworks developed in the industrial, commercial and institutional sector of the construction industry, one being concrete forming construction carried out by all employees represented by the same trade union and the other being concrete forming construction carried out by employees represented by their different craft unions: labourers, ironworkers, carpenters and cement finishers. (I do not include employees represented by the operating engineers since that craft union represents employees in both frameworks since it is a constituent union of the Formwork Council of Ontario.) For example, *Verdi Forming Limited*, [1983] OLRB Rep. Oct. 1728, including the concurring decision of Board Member C. A. Ballentine; *Runnymede Development Corporation Limited, supra*; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254, app. for recon. dismissed [1989] OLRB Rep. Mar. 234; and *Rockwall Concrete Forming (London) Limited*, [1988] OLRB Rep. Sept. 963.

26. The intervenors have not persuaded me that it is necessary to have them intervene to provide their perspective on the issues raised in this application for accreditation.

27. The motion by the applicant and responding party to strike the interventions filed and deny standing to the two intervenors is granted.

28. This matter is referred to the Registrar to schedule one day of hearing in consultation with the applicant and the responding party to deal with all other issues arising in this accreditation proceeding.

0556-07-R Ticketmaster Canada Ltd., Applicant v. Canadian Office and Professional Employees Union Local 343, Responding Party

Abandonment – Representation Vote – Termination – Timeliness – The employer applied for termination of bargaining rights pursuant to s. 65 of the Act – The union provided the employer with notice to bargain on April 4, 2006 and promised to forward the union's available bargaining dates by the end of that month, then it transferred the file to another representative – The new union representative commenced an extended sick leave – In April of 2007, the union realized that no bargaining had occurred and sent out a notice of meeting for May 2007 – The Board found that the threshold for abandonment was not reached because the union attempted to begin bargaining once the delay was realized – However, the Board also found that the union's delay in bargaining was significant and its explanation was unsatisfactory – The Board exercised its discretion to direct a representation vote – Matter continues

BEFORE: *Patrick Kelly*, Vice-Chair, and Board Members *R. O'Connor* and *S. McManus.*

APPEARANCES: *Irv Kleiner* and *Neil Halliday* for the applicant; *Sean Clancy, Patty Clancy* and *Carter Siddall* for the responding party.

DECISION OF THE BOARD; November 15, 2007

1. This is an application for termination of bargaining rights under section 65 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"). More specifically, the applicant (or "Ticketmaster") seeks the termination of the responding party's bargaining rights on the basis of the application of subsection 65(2) which grants the Board a discretion to terminate the bargaining rights of a trade union that has allowed a period of 60 days to elapse during which it has not commenced to bargain following the giving of notice to bargain. In this case, it is not seriously disputed that, following the notice to bargain, the responding party ("the union") failed to commence bargaining for a period in excess of one year.

2. The union was certified on September 15, 1992 and the parties have negotiated several collective agreements without significant incident. The last collective agreement between them was for a term from April 1, 2003 to June 30, 2006. The union served the applicant with notice to bargain on April 4, 2006. On April 5, 2006, counsel for the applicant contacted the union's representative, Patty Clancy, with a view to scheduling bargaining dates. By letter dated April 18, 2006, Ms. Clancy said she would forward the union's available dates as soon as she was able to confirm the availability of the union's bargaining committee members. She stated that she hoped to be in a position to do so by the end of April 2006.

3. Ms. Clancy's letter of April 18, 2006 was the last communication about bargaining between the union and the applicant until the filing of this application on May 9, 2007. Later that day, prompted by the delivery of the application, the union wrote to the Ministry of Labour requesting the appointment of a conciliation officer. The applicant objected to the appointment, but participated in two meetings with the conciliation officer and the applicant on a without prejudice basis. The parties exchanged bargaining proposals in the course of those meetings.

4. Ms. Clancy testified that the reason behind the union's silence was due to inadvertence. Ms. Clancy transferred responsibility for the Ticketmaster bargaining to another union representative because she had to attend to a difficult set of bargaining with another employer. The new union representative became seriously ill and took an extended sick leave, which continued to the date of the hearing in this matter.[1] Meanwhile, Ms. Clancy was preoccupied with her difficult assignment and ensuing nine-month strike, which kept her out of the union's office for a large proportion of time. Some time in April 2007, Ms. Clancy wondered what had happened to the Ticketmaster file, only to discover that no bargaining had occurred. She decided to send out a notice of a meeting for May 10, 2007 to the bargaining unit employees.[2] Her understanding is that the notice was delivered by regular mail to all the employees later in April 2007, and that a copy was sent to the applicant for posting in the

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[1] The union did not officially replace the representative until the late summer of 2007, although his duties were distributed among the union's remaining staff well before then.

[2] A copy of the undated notice was produced in evidence. It gives no indication of the subject matter of the meeting.

workplace.[3] At the meeting of May 10, 2007, a single individual was designated as the union's bargaining committee.

5. There was a dispute between the parties as to whether or not the union appointed a union steward for the bargaining unit since the winter of 2005. There was no dispute, however, that the union did not inform Ticketmaster of the name of a steward, as it was required to do under the last collective agreement, until July 9, 2007.

6. Subsection 65(2) of the Act reads:

> **65.**(2) Where a trade union that has given notice under section 16 or section 59 or that has received notice under section 59 fails to commence to bargain within 60 days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of 60 days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

As counsel for the applicant pointed out, the elements of subsection 65(2) are established. The union did not argue that Ms. Clancy's letter of April 18, 2006 constituted the commencement of bargaining. Even if it had, no bargaining took place between the date of that letter and the filing of the application. The union failed to commence to bargain for a period well in excess of sixty days after it gave notice under section 59 of the Act, and in any event, let more than sixty days elapse without seeking to bargain with the applicant. In those circumstances, an employer or any bargaining unit employee may, as of right, apply to terminate bargaining rights. Whether the Board will terminate bargaining rights is a matter of discretion.

7. The applicant takes the position that the union abandoned its bargaining rights. Abandonment is a question of fact. In cases where the Board has found abandonment, the period of inactivity by the trade union has generally been substantial, after several years. The length of the union's inactivity in this case, though considerable, does not reach that threshold. In any event, there are facts in this matter which suggest that the union did not abandon its bargaining rights. It appears clear that the union intended to bargain with Ticketmaster as it had done on a number of occasions in the past, but that things went significantly awry with the illness of the new union representative. For a lengthy period of time, no one in the union seemed to notice the neglect of the bargaining unit. However, when the reality of the situation finally dawned upon Ms. Clancy, she took action in April 2007, before the filing of the application, to bring the bargaining unit employees together for a meeting that happened to be scheduled after the applicant made its application. In our view, then, it is not possible to say that the union abandoned its bargaining rights at the time the application was made.

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[3] Neil Halliday, the applicant's Senior Vice President, testified that he personally was never aware of any posted notice of the meeting in the workplace. However, in the course of the hearing on October 19, 2007, he learned from management staff that some sort of union notice had been posted in the workplace. The person or persons to whom Mr. Halliday spoke apparently were not able to tell Mr. Halliday when the notice was received.

8. The union argues that the Board should not allow the statute to be used by an opportunistic employer to rid itself of a trade union or to test its support among the bargaining unit members. In our view, there is no evidence that Ticketmaster was being particularly opportunistic in this matter. As an employer, it is entitled under subsection 65(2) to bring an application where there has been a failure to commence or continue bargaining within the sixty-day time frame. It is not entitled, however, to a declaration terminating bargaining rights merely because the union has been inactive. That is a matter for the Board in the exercise of its discretion.

9. Section 65 is premised upon a recognition that a collective bargaining relationship requires engagement by the entity with the representation rights, i.e. the trade union. When the trade union fails to exercise its representation rights by not engaging in the collective bargaining process, the employees are left in labour relations limbo, at least until the statutory "open period" commences to operate. Section 65 suggests that neither employers nor employees should be kept inordinately in suspense as to whether or not the trade union will exercise the bargaining rights conferred to it under the Act. If it appears that the trade union is not interested in bargaining for a protracted period, or simply fails to bargain for other reasons that are not reasonable, it risks either losing those rights altogether, or at least a test of its support as the bargaining agent.

10. Three cases illustrate the Board's approach under subsection 65.

11. In *Prescott Machine and Welding Inc.*, [1983] OLRB Rep. Feb. 250, the collective agreement expired on November 20, 1982. The union served notice to bargain on September 15, 1982, but expended very little effort to get the bargaining underway. Only in early November 1982 did the trade union begin planning a meeting with bargaining unit employees, which took place on November 29, 1982, the same day the employer filed its application to terminate bargaining rights. The Board noted that the employer's application came only nine days after the expiring of the collective agreement. The Board also observed that, as of the date of the hearing, no employee had filed an application in the course of a lengthy "open period" to terminate the trade union's bargaining rights. Accordingly, the Board dismissed the application without a representation vote.

12. *Darrigo's Supermarkets Ltd.*, [1982] OLRB Rep. January 32 involved the failure of a trade union to serve notice to bargain after its certification by the Board. The trade union did not respond to the employer's application to terminate bargaining rights and did not attend the hearing. The Board stated that in the absence of any explanation by the trade union, and given the evidence concerning the expression of a vast majority of employees not to be represented by the trade union, the trade union's bargaining rights ought to be terminated without a vote.

13. In *Riverview Manor Nursing Home*, [1993] OLRB Rep. Jan. 54 the trade union was certified in 1988 to represent employees of a hospital. The first round of collective bargaining led to interest arbitration, with the result that by the time the arbitration award was finalized on May 30, 1992, the resultant collective agreement had expired nearly two years earlier. The trade union served the hospital with notice to bargain a renewal agreement on July 21, 1992. The hospital responded on July 31, 1992 by suggesting dates in mid-September 1992 for the commencement of negotiations. The union replied on August 28, 1992, indicating that, due to internal reorganization, it had not responded promptly to the hospital, but that it would respond in early October 1992. The trade union, however, did not get back to the hospital about bargaining

(although it did contact the hospital about an issue under the collective agreement), and the hospital accordingly filed an application to terminate bargaining rights, which came on for hearing on December 18, 1992.

14. The Board in *Riverview Manor* determined that the union's explanation for its delay in bargaining was not reasonable, and that the hospital had not contributed to the delay. The Board noted that, despite the lack of any effort to pursue bargaining, the trade union had continued to represent the employees, and therefore the Board ordered a representation vote in those circumstances.

15. The instant matter falls within the *Riverview Manor* situation. The union's delay in bargaining is significant[4]. Its explanation for delay is not satisfactory. However, Ms. Clancy's decision in April 2007 to call a meeting of the bargaining unit is evidence of the union's continuing interest in actively representing the bargaining unit employees. In the absence of the calling of that meeting, we might well have found that, after a period of inactivity of more than one year, the union's bargaining rights ought to be terminated without a representation vote. However, in the circumstances, we think the employees ought to be given a chance to determine the issue through the ballot box.

16. For these reasons, we exercise our discretion to direct a representation vote be taken of all employees of Ticketmaster Canada Ltd. who are regularly employed on the date of this decision in the phone room as operators and as box office ticket sellers in the City of Toronto, save and except Assistant Managers, supervisors and persons above the rank of supervisor.

17. Voters will be asked to indicate whether or not they wish to continue to be represented by Canadian Office and Professional Employees Union, Local 343 in their employment relations with Ticketmaster Canada Ltd.

18. In the circumstances, the Board directs the parties to forthwith contact the Manager of Field Services regarding this application and to return a completed Vote Arrangements form, attached to this decision, directly to the Vote Coordinator within two days of receiving this decision. In addition, the employer is directed to submit a proposed voter's list, copied to the union, within two days of receiving this decision.

19. The applicant is directed to post copies of this decision in a location or locations in the workplace where it is likely to come to the attention of the employees in the bargaining unit.

20. The matter is referred to the Registrar.

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[4] The delay far exceeds the period in the *Riverview Manor* case, but does not begin to approach the more than two-year delay in *F.C.M. Construction Limited*, [1982] OLRB Rep. May 670, where the Board also exercised its discretion to order a vote.

CONCURRING OPINION OF BOARD MEMBER SHANNON McMANUS; November 15, 2007

I concur with the above. There was a mitigating factor in this case. The bargaining unit had been dramatically reduced. The employer had eliminated the phone room operation where the union stewards were situated. Stewards can bring servicing failures to the attention of a union. In this case, however, too much time transpired (more than a year) with no communication between the union and its members or the employer, so I agree that a representation vote is appropriate.

0382-07-R Greater Ontario Regional Council of Carpenters and Allied Trades United Brotherhood of Carpenters, Local 494, Applicant v. **Titan Contracting (Windsor) Inc.**, Paramount Homes Inc., Portofino Corporation, Responding Parties v. Labourers' International Union of North America, Local 625, Intervenor

Construction Industry – *Prima Facie* Motion – Related Employer – The Carpenters were certified to represent carpenters employed by Titan; LIUNA, voluntarily recognized by Paramount, represented construction employees performing concrete formwork – The Carpenters sought a declaration that Paramount and Titan were related – LIUNA brought a motion to dismiss the application for failing to make out a *prima facie* case – The Board held that there was nothing to prevent LIUNA from acquiring bargaining rights with Paramount, notwithstanding that the Carpenters could have earlier claimed similar bargaining rights through a s. 1(4) application – *Prima facie* motion dismissed – Matter continues

BEFORE: *Susan Serena*, Vice-Chair, and Board Members *B. Roberts* and *R. Baxter*.

APPEARANCES: *Melissa Kronick* and *Tomi Hulkkonen* appeared for the applicant; *Eli Gedalof* and *R. Petroni* appeared for Labourers' Local 625.

DECISION OF THE BOARD; November 28, 2007

1. This is an application under section 69 and/or subsection 1(4) of the *Labour Relations Act, 1995* S.O. 1995 c.1 as amended (the "Act").

2. This decision deals with the intervenor's preliminary motion to have the application dismissed on a *prima facie* basis without a hearing. Labourers' International Union of North America, Local 625 ("LIUNA 625") submit the Board would not exercise its discretion under subsection 1(4) of the Act to make the declaration requested even if all the facts asserted in the application are assumed to be true and provable.

3. Motions to dismiss an application on a *prima facie* basis are governed by Rule 39.1 of the Board's Rules of Procedure. :

> 39.1 Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the

> application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

Therefore, for the purpose of this motion the Board must assume that all of the facts pleaded by the applicant Greater Ontario Regional Council of Carpenters and Allied Trades United Brotherhood of Carpenters, Local 494, ("Carpenters 494") are true and provable.

4. The following facts are either asserted in the application or were stipulated by the parties:

> a) In July 2001, Carpenters 494 were certified to represent all carpenters and carpenters' apprentices employed by Titan Contracting (Windsor) Incorporated, ("Titan") in the ICI sector in the Province of Ontario and in all other sectors of the construction industry in Board Area 1.
>
> b) On July 21, 2006, in Board File No. 1283-06-R, LIUNA 625 applied to represent a bargaining unit comprised of all construction labourers employed by Paramount Homes Inc., ("Paramount") in the ICI sector in the Province of Ontario and all other sectors of the construction industry in Board Area 1.
>
> c) LIUNA 625 did not represent carpenters or have membership cards from the carpenters and the Carpenters 494 did not have status to intervene in Board File No. 1283-06-R.
>
> d) By October 2006, the responding parties Titan and Paramount knew they were carrying on associated or related activities under the common direction or control of Art Ussoletti and Dante Capaldi.
>
> e) The responding parties and LIUNA 625 knew Carpenters 494 had bargaining rights with Titan.
>
> f) Without the knowledge of the Carpenters 494, Paramount and LIUNA 625 entered into Minutes of Settlement (within the meaning of s. 96(7) of the Act) on October 11, 2006, in Board File 1283-06-R. Under that settlement, the application for certification was withdrawn and Paramount and LIUNA 625 entered into a collective agreement (the collective agreement between the Ontario Formwork Association and the Formwork Council of Ontario the scope of which covers all construction employees performing concrete formwork) that Carpenters 494 asserts undermines their bargaining rights.

g) In March 2007, Carpenters 494 filed two grievances against Titan regarding work being performed at two Starbucks projects (Huron Park and Tecumseh) in Windsor. Titan's response to these grievances stated the work (i.e. formwork) was performed by Paramount.

h) On or about May 15, 2007, Carpenters 494 became aware of the extent of the relationship between Paramount and Titan and that Titan was using non-union personnel, including labourers, to perform work covered by the Carpenters' Collective Agreement at the Starbucks project on Huron Church Line, in Windsor.

i) On April 27, 2007, LIUNA 625 filed an application for certification (Board File No. 0373-07-R) to represent all construction labourers, carpenters and carpenters' apprentices employed by Paramount in all sectors of the construction industry except the ICI sector in Board Area 1.

j) On April 27, 2007, Carpenters 494 filed this application under subsection 1(4) and section 69 of the Act.

k) On April 28, 2007, Carpenters 494 filed an application for certification (Board File No. 0418-07-R) to represent all carpenters and carpenters' apprentices employed by Paramount in the ICI sector in the Province of Ontario and in all other sectors in Board Area 1 and all construction employees in all sectors except the ICI sector in the Province of Ontario.

l) On September 18, 2007, Carpenters 494 and the responding parties in this application entered into a memorandum of agreement wherein Titan and Paramount acknowledged they are related employers within the meaning of section 1(4) of the Act and Paramount agreed to be bound by the bargaining rights and collective agreements between Carpenters 494 and Titan.

5. Finally, Carpenters 494 and LIUNA 625 agree this motion is without prejudice to either party's position with respect to Carpenters 494's allegations that the voluntary recognition agreement and collective agreement between LIUNA 625 and Paramount are contrary to the Act, including section 53 of the Act.

Submissions by LIUNA 625

6. LIUNA 625 asserts that on October 11, 2006 it entered into a legally binding settlement of a Board proceeding that the Board has both, an institutional interest in upholding and legal obligation to enforce, pursuant to subsection 96(7) of the Act. It further asserts that as part of that settlement LIUNA 625 and Paramount entered into a binding collective agreement that covers formwork.

7. LIUNA 625 also maintains that as of October 11, 2006 Paramount was not bound to any collective agreements with the Carpenters 494. LIUNA 625 submits that under subsection 1(4) of the Act bargaining rights do not exist until the Board so declares and a distinction must be made between the actual existence of bargaining rights and a state of affairs that could give rise to such rights under subsection 1(4) of the Act. Further, LIUNA 625 contends that if the existence of facts that might support a declaration under subsection 1(4) of the Act are sufficient to preclude another union from obtaining bargaining rights then every application for certification is subject to a possible assertion, at a later date, that another union held the bargaining under subsection 1(4) of the Act.

8. Finally, LIUNA 625 submits the jurisprudence establishes that the Board will not exercise its discretion under subsection 1(4) of the Act where the declaration will interfere with existing bargaining rights, create a conflict with the established bargaining rights held by another union or defeat an application for certification brought by another union. (See: *Zaph Construction Ltd.*, [1977] O.L.R.B. Rep. Nov 741, *Industrial-Mine Installations Limited* [1972] O.L.R.B. Rep. Dec.1029 and *Al Smith Plastering & Partition Co. Ltd.*, [1981] O.L.R.B. Rep. Feb 129, *Hardrock Forming Company* [1987] O.L.R.B. Rep. July 1003, *Hastings County Local Housing Corporation* [2002] O.L.R.B. Rep. March/April 205 (March 4, 2002)).

Submissions by Carpenters 494

9. Carpenters 494 start from the proposition that they are not asking the Board to revoke LIUNA 625's bargaining rights as part of the exercise of discretion under subsection 1(4) of the Act which distinguishes this case from the facts in the decisions relied upon by LIUNA 625. Carpenters 494 also rely on the fact that only a portion of the bargaining rights held by LIUNA 625 and Carpenters 494 conflict (i.e. formwork) and Titan does not perform formwork. Further, Carpenters 494 contend that nothing in the September 18, 2007 settlement between the Carpenters 494 and the responding parties alters LIUNA's bargaining rights with Paramount. Rather, the Carpenters 494 maintain this agreement simply confirms that Titan and Paramount are related employers and Paramount acknowledges it is also bound to the Carpenters' collective agreements with Titan.

10. Carpenters 494 also asserts that unlike the facts in *Hardrock Forming Company, supra*, there is no imminent conflict or pending jurisdictional dispute that would flow from the overlap in bargaining rights at Paramount. It further submits the mere potential for such a conflict is not a basis for the Board to refuse to issue a declaration under subsection 1(4) of the Act. (See: *512823 Ontario Inc. c.o.b. as I & I Construction Systems and Dewar Insulations Inc.*, [1992] O.L.R.D. No. 2064, *Aluma Systems*, [1997] O.L.R.D. No. 1007).

11. Carpenters 494 further submits the responding parties are engaged in the precise mischief subsection 1(4) seeks to address. Carpenters 494 maintains it is simply trying to preserve its bargaining rights with Titan, a homebuilder that has now moved into the ICI sector and high-rise residential sector (under the guise of Paramount) so that the company can perform the work that is outside the scope of the Labourers' agreement non union.

12. Carpenters 494 also asserts this application was filed promptly and it would have been premature to file the application before the responding parties had engaged in the mischief subsection 1(4) seeks to address or the Carpenters' bargaining rights had been undermined. (See:

RLP Machine and Steel Fabrication Inc., [2004] OLRB Rep. July/August 784 (July 22, 2004), *Aecon Buildings*, [2006] OLRB Rep. March/April 125 (April 25, 2006), *KNK Limited*, [1991] O.L.R.B. Rep. February 209, and *Aluma Systems, supra.* Carpenters 494 contend that if LIUNA 625 prevails in this motion then unions will be forced to file applications prematurely in order to protect their bargaining rights.

13. Carpenters 494 submit the proper question for the Board to consider is whether to ignore the mischief subsection 1(4) is designed to address or to enforce the October 11, 2006 settlement that bound Paramount to a collective agreement with LIUNA 625 in circumstances where the settlement was not a matter of public record and LIUNA's bargaining rights are not long-standing.

14. Finally, Carpenters 494 asserts that pursuant to section 111 of the Act, the Board has the power to order a representation vote in the context of an application filed under subsection 1(4) of the Act. It submits if the Board is considering dismissing the application, it should consider whether a vote would be appropriate to resolve the conflict in bargaining rights as the Board directed in *City of Toronto and Toronto Community Housing Corporation* [2002] O.L.R.D. No. 662 (February 21, 2002).

Reply by LIUNA 625

15. In reply, LIUNA 625 maintains the facts in *City of Toronto, supra* are clearly distinguishable and, as a result, there is no basis for the Board to hold a representation vote in this case. It similarly submits the decision in *Dewar Insulations Inc., supra,* is not helpful because that case involved a dispute between two unions over the performance of certain insulation work in the ICI sector as opposed to the dispute in this case which involves the conflict between the right of two unions to represent employees when they perform formwork.

Decision

16. Subsection 1(4) of the Act reads as follows:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

17. The power of the Board to issue a declaration under subsection 1(4) is discretionary. As a result, the Board is not obligated to grant the relief sought in this application even if all the pre-conditions exist for the issuing of a declaration under this provision. In *KNK Limited, supra*, the Board discussed the application of subsection 1(4) and the exercise of discretion in that case as follows:

> In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past…A union's undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests the union will not know) may be a factor to be considered in exercising the Board's discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union's inaction actually contributed to that prejudice…

18. The clear and obvious mischief that subsection 1(4) seeks to address is the undermining or erosion of a union's established bargaining rights through business or commercial transactions between two or more related entities even where those transactions were not intended to undermine the union's bargaining rights.

19. Critical to the facts before the Board in this case is the Board's observation in *Zaph Construction Limited, supra*, that "related employers do not constitute one employer for the purposes of the Act unless and until the Board so determines". As asserted by LIUNA 625, a distinction must be drawn between the actual existence of bargaining rights and circumstances that would give rise to the right of a union to assert the existence of such rights.

20. In this case Paramount and Titan have yet to be the subject matter of a declaration under subsection 1(4) of the Act. Accordingly, in October 2006 it was open to LIUNA 625 to acquire bargaining rights with Paramount notwithstanding that Carpenters 494 could have asserted bargaining rights with Paramount at that time pursuant to subsection 1(4) of the Act. For the purposes of this motion, the Board is not concerned with the manner or circumstances under which LIUNA 625 acquired its bargaining rights with Paramount. In any event, the Carpenters indicated they are not seeking to have LIUNA 625's bargaining rights with Paramount revoked as part of this application.

21. The Board has previously dealt with situations in which a trade union seeks to acquire bargaining rights with a company and another trade union that has bargaining rights with a "related" company seeks a declaration under subsection 1(4) of the Act. In *Zaph Construction Limited, supra*, the Board followed the reasoning in *Industrial Mine Installations Limited supra*, wherein the Board refused to exercise its discretion under section 1(4) and allowed the application for certification to proceed. In the *Industrial Mine* decision the Board stated:

> …we do not think that section 1(4) was intended to be used by one trade union as a bar to another trade union obtaining bargaining rights in a company where the first trade union held no existing bargaining rights. Where a trade union is confronted with a situation raised by Section 1(4) it has an obligation to act promptly and where related or associated employers are desirous of obtaining the benefits of Section 1(4) they too must act promptly. If the parties choose to leave exposed bargaining rights in a multientity situation they do so at their peril and at the risk that another trade union may enter the situation and claim those exposed bargaining rights.

22. The approach utilized in *Industrial Mines* has also been applied in a situation that more closely resembles the facts in this case before the Board, namely where an application for a declaration under subsection 1(4) of the Act was filed after the bargaining rights for the target company had been obtained by another trade union. In *Al Smith Plastering & Partition Co. Limited, supra,* the Board signalled its unwillingness to revoke the bargaining rights of the incumbent trade union through a declaration under subsection 1(4) of the Act. In *Hardrock Forming Company, supra,* which dealt with a situation that involved a complete overlap in bargaining rights, the Board's rationale for refusing to grant the related employer declaration was succinctly stated in paragraph 17:

> …More fundamentally, however, a related employer declaration with either Delform or Ilena would immediately raise a conflict with Local 183's established bargaining rights and would immediately precipitate a jurisdictional dispute. In effect, the combined entities would be bound by conflicting collective agreements with two unions involving the same work and Delform would be drawn into a jurisdictional dispute between them. That is a recipe for collective bargaining discord which we should not lightly condone; moreover, the Board has always been reluctant to make a "related employer" declaration when the effect is to create a conflict with established rights held by another union (See: *Al Smith Plastering and Partition Co. Ltd,* [1981] OLRB Rep. Feb. 129).

23. In the case before the Board, Carpenters 494 seek a related employer declaration relating to Titan and Paramount in circumstances where Paramount is already bound to a collective agreement with LIUNA 625. The Board would have no difficulty in applying the above jurisprudence and concluding that it would not exercise its discretion under subsection 1(4) of the Act to declare Titan and Paramount a common employer if such a declaration meant that each company was left with conflicting and irreconcilable bargaining rights. Nor would the Board be prepared to revoke LIUNA's bargaining rights with Paramount to allow the declaration under subsection 1(4) of the Act. The fact that LIUNA 625 only acquired its bargaining rights in October 2006 is not a compelling reason for the Board to deviate from the above jurisprudence on this issue.

24. However, in this case, Carpenters 494 are not asking the Board to revoke LIUNA's bargaining rights with Paramount. Further, Carpenters 494 point out that the overlap in bargaining rights at issue is limited to the performance of formwork. Carpenters 494 also maintain they brought this application at the earliest possible opportunity and did not leave their bargaining rights exposed. Therefore, the question for the Board is whether in these circumstances the Board would issue a declaration under subsection 1(4) of the Act?

25. Unlike the situation in *Zaph Construction Ltd., supra,* the facts in this case (that the Board must assume are true and provable) do not support the conclusion that Carpenters 494 left its bargaining rights exposed or ought to have moved more quickly *via a vis* Paramount. Rather, in this case the Board concludes Carpenters 494 moved promptly after it became aware of the relationship between the responding parties and that they were engaged in the mischief subsection 1(4) seeks to address.

26. Further, as asserted by Carpenters 494, the cases relied upon by LIUNA 625 appear to involve situations where there was either a complete or substantial overlap in the bargaining

rights and/or the conflicting bargaining rights would give rise to an immediate jurisdictional dispute. Obviously, in these situations there is no practical way for the Board to issue a declaration under subsection 1(4) of the Act without revoking bargaining rights or setting the stage for jurisdictional disputes.

27. However, in the instant case the overlap in bargaining rights is limited to construction employees performing concrete formwork. The Board is not dealing with a situation where there is either a complete or substantial overlap in the bargaining rights held by LIUNA 625 and the bargaining rights asserted by Carpenters 494. The fact that one union previously acquired the bargaining rights for employees performing a particular type of work or trade does not, and ought not to, preclude another trade union from subsequently acquiring bargaining rights over a different type of work or trade, whether through an application for certification or application under subsection 1(4) of the Act.

28. If the only work that Paramount performed was formwork (as was the case in *Hardrock Forming Company*) then the Board might well conclude it would not exercise its discretion under subsection 1(4) of the Act for the reasons discussed herein. Here, however, both unions maintain that Paramount employs unrepresented carpenters and labourers and performs work in various sectors of the construction industry, including the ICI sector. The Board also recognizes that formwork is only a sub-set of the work that falls within the scope of the bargaining rights LIUNA 625 holds with Titan. The Board can address this overlap in bargaining rights by excluding formwork from the bargaining rights covered by any declaration that might be issued to Carpenters 494 under subsection 1(4) of the Act. By proceeding in this manner it is not necessary for the Board to revoke the bargaining rights between LIUNA 625 and Paramount or undermine the settlement between these parties in Board File No. 1283-06-R.

29. Finally, in disposing of this motion the Board did not rely on the assertion by Carpenters 494 that there is no imminent conflict or pending jurisdictional dispute flowing from the overlap in bargaining rights. However, had there been sufficient facts for the Board to conclude a jurisdictional dispute was imminent this would not compel us to grant the motion and dismiss the application on a *prima facie* basis. The responding parties were aware they were "related" at the point in time that Paramount entered into the voluntary recognition agreement with LIUNA 625.

30. For the reasons set out above this preliminary motion is dismissed. The Board finds it could exercise its discretion to grant a declaration under subsection 1(4) of the Act in this case.

31. This matter is referred to the Manager of Field Services to have a Labour Relations Officer consult with the parties regarding whether they wish to reconvene the hearing in this matter or make written submissions to the Board regarding the appropriate description of the bargaining rights that would be the subject matter of a declaration under subsection 1(4) of the Act.

1434-07-ES Total Debt Freedom Inc., Applicant v. Rebecca Davis, and Director of Employment Standards, Responding Parties

Employment Standards – Settlement – The employee (one of three co-defendants in a civil action by the employer alleging breach of contract, conspiracy and theft) signed an affidavit in support of a motion in the civil action referring to the fact that the employer had stopped payment on her last pay cheque – The employee's *ESA* complaint was known to the parties when the lawsuit was settled and all three defendants entered into a standard release "from any and all claims" with respect to the court file – The employer submitted that the employee was barred from filing the claim pursuant to s. 98 and because she had already received a benefit under the settlement – First the Board found that an interlocutory motion by a defendant in a civil action is not the commencement of a civil proceeding and accordingly does not bar her claim under s. 98 – Second, the release did not specifically reference the *ESA*, and it easily could have, given the parties' knowledge of the claim – Accordingly, the release was no impediment to the employee's claim – Application dismissed, order to pay confirmed

BEFORE: *Patrick Kelly*, Vice-Chair.

DECISION OF THE BOARD; December 20, 2007

1. This is an employer application under the *Employment Standards Act, 2000*, S.O. 2000, c. 41, as amended ("the Act") for review of Order to Pay No. 33658.

2. In my decision of October 24, 2007, I stated at paragraphs 2 through 6:

> 2. It appears that the applicant does not dispute any of the facts underlying the responding party employee's claim for unpaid wages earned for the period July 15, 2006 until July 28, 2006. The applicant states, however, that the Employment Standards Officer had no authority to make an order to pay because of the application of subsection 98(1) of the Act.
>
> 3. Subsection 98(1) of the Act states:
>
> > **98.**(1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.
>
> 4. The applicant contends that, after the responding party employee ("Ms. Davis") made her claim for unpaid wages with the Ministry of Labour, the applicant commenced a civil action against Ms. Davis and two other former employees of the applicant for damages for breach of contract, conspiracy and theft of property. In the course of the litigation, the defendants filed a motion for particulars, and Ms. Davis signed an affidavit in support of that motion in which she averted to the fact that the applicant had stopped payment on her last pay cheque. The lawsuit was eventually settled. The settlement required the payment of monies by Ms. Davis's two co-defendants to the applicant. All three defendants and the applicant entered into a mutual release which released all the parties "from any and all claims, demands, rights, causes of action, actions, suits, damages, losses and expenses of whatever kind or nature, including without limitation, that which was raised or which could have been raised by way of claim, counterclaim, crossclaim

> or otherwise, with respect to Ontario Court File No. 06-CV-319269PD1 (TDF v. JR, RD and WC)."
>
> 5. The applicant appears to suggest that the motion by Ms. Davis and her co-defendants, and/or her affidavit in support of the motion, constituted the commencement by Ms. Davis of a civil proceeding with respect to an alleged failure to pay wages within the meaning of subsection 98(1), thus barring her from filing a complaint under the Act or having such a complaint investigated. Consequently, the applicant suggests, the Employment Standards Officer, and by extension, the Board, are without jurisdiction to make an order to pay. The applicant also contends that Ms. Davis has received a benefit under the settlement and release in the civil action, and that the policy underlying subsection 98(1) prohibits an employee from receiving a second benefit (the unpaid wages) under the Act.
>
> 6. It appears to me that, given the lack of any factual dispute that the applicant withheld Ms. Davis's wages, the legal issues in this application can be decided on the basis of the materials before the Board, without the necessity of an oral hearing: see Rule 41 of the Board's Rules of Procedure. To the extent the responding parties wish to make submissions with respect to the legal arguments offered by the applicant, they must provide the Board and the parties opposite with their written submissions on or before November 14, 2007. The applicant shall have until November 21, 2007 to provide the Board and the parties opposite with any reply submissions.

3. The Board is in receipt of submissions by the responding party employee, Rebecca Davis. The Board has not received any submissions from the Director of Employment Standards or reply submissions from the applicant.

4. Ms. Davis submits that the lawsuit filed by the applicant has nothing to do with her claim under the Act. She points out that her claim was filed before the lawsuit. She also refers to subsection 5(1) of the Act, which prohibits employers and employees from contracting out or waiving an employment standard.

5. In my view, the applicant's interpretation of subsection 98(1) is erroneous. To the extent an interlocutory motion by a defendant in a civil suit can be properly construed as the commencement of a civil proceeding – an assertion that strikes me as highly unlikely – the affidavit Ms. Davis made in support of her motion in the lawsuit cannot be fairly characterized as being "with respect to an alleged failure to pay wages" as suggested by the applicant. Despite the affidavit's reference to a "stop-payment" of her last pay cheque by the applicant, clearly the purpose of the affidavit was to obtain particulars of the applicant's lawsuit allegations. It made no claim against the applicant for unpaid wages. I therefore reject this portion of the applicant's argument.

6. The applicant's position with respect to Ms. Davis having received a benefit pursuant to the mutual release, however, bears more serious consideration. Again, I do not think subsection 98(1) is of any assistance in that analysis. It does not speak to the issue of the effect of settlements on a proceeding under the Act. Nor does there appear to be a wealth of jurisprudence dealing with the impact of a release given in a civil action on the viability of an application brought under the Act.

7. The only case of which I am aware that considers the effect of a civil settlement on a proceeding under the Act is *William Cunningham carrying on business as Reid's Interiors* [1991] O.E.S.A.D. No. 123, (unreported, ESB File No. 095970, November 12, 1991, Referee Hovius). In that matter, the employee, Jack Reid, was the former owner of the business that came to employ him, following a sale of the business to William and Twylia Cunningham. The sale was documented in a contract under which Mr. Reid was leased living space in the building in which the business was located, and was employed by the new owner for a five-year term.

8. The employment relationship was unremarkable for the first two years. However, a dispute arose in January 1990 about Mr. Reid's entitlement to overtime pay. The Ministry of Labour brought the issue to Mr. Cunningham's attention. In March 1990, the Cunninghams discontinued part of the business, and Mr. Cunningham advised Mr. Reid of his termination from employment, but kept Mr. Reid on until May 1990. However, Mr. Cunningham withheld seven weeks' wages from Mr. Reid on account of unpaid rent and other alleged debts. Mr. Reid responded by commencing a law suit for damages for breach of the contract of the sale of the business. His statement of claim alleged that he suffered losses related mainly to future wages and the increased cost of alternative employment. The lawsuit did not claim losses as a result of the withheld wages, or unpaid overtime or vacation pay.

9. The lawsuit was ultimately settled in June 1990. The Cunninghams' lawyer wrote a letter to Mr. Reid's counsel proposing that his client would pay the applicant $2500 in respect of wages, including wages for the weeks of April 14 and 21, 1990 net of rent, and three weeks' pay and vacation pay under the *Employment Standards Act*. Mr. Reid's lawyer countered with a proposal that Mr. Reid be paid $2500 "on account of interest and claim" and that the employer pay costs of $750. That counterproposal was accepted, and a court order implementing the settlement followed.

10. Mr. Reid then filed a claim under the Employment Standards Act for unpaid regular wages and overtime pay, which was made the subject of an order to pay. Mr. Cunningham appealed, and argued that the settlement was intended to be a complete settlement of any past or future claims by any of the parties relating to the sale of the business or the employment of Mr. Reid.

11. The Referee disagreed, and stated at page 5 of the decision:

> Since the settlement was reached in the context of a specific lawsuit, any party who wished the scope of the settlement to extend beyond the claim made in the lawsuit should have stipulated this expressly and obtained agreement from the other party.

12. In my view, the same sort of analysis ought to apply in the case before me. The lawsuit between the parties was for breach of contract, conspiracy and theft. It had nothing to do with claims by Ms. Davis for unpaid wages. If it had, there presumably would have been some sort of explicit reference to those wages in the settlement[1] and release. After all, the applicant and Ms. Davis were both aware when they settled the lawsuit that Ms. Davis's final wages had been held back by the applicant. It would have quite easy to include a reference to those wages in

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[1] There was a settlement dated January 9, 2007 according to the release of January 10, 2007. However, the applicant provided the Board only with a copy of the release.

the release. I can only surmise that they did not do so because their entire focus was upon the litigation at hand. That is the reason the release refers to "Ontario Court File No. 06-CV-319269PD1"; the parties were interested in dealing with any claims of "whatever kind or nature" arising out of that particular Court file. Of course, they could have broadened the release to specify the issue of Ms. Davis's last pay cheque, or to preclude any past or future claims under the Act, but they did not do so.

13. Accordingly, the release is no impediment to Ms. Davis's claim under the Act. She worked for her final pay cheque, and the applicant was not entitled to withhold those earnings.

14. I hereby affirm the Employment Standards Officer's order to pay. The Director of Employment Standards is authorized to distribute the monies paid in trust by the applicant, in accordance with the order to pay.

0413-06-R Public Service Alliance of Canada, Applicant v. **University of Western Ontario**, Responding Party

Bargaining Unit – Certification – Employee – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not create an employment relationship – Bargaining unit was not appropriate – Matter continues

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *James Hayes, Patrick Groom, Christopher Wilson, Todd Woytiuk* and *Michelle Sweeney* appeared on behalf of the applicant; *Michael D. Failes, R. Lance Ceaser, Jane O'Brien, Jennifer Schroder* and *Alan Weedon* appeared on behalf of the responding party.

DECISION OF THE BOARD; December 6, 2007

1. This is an application for certification.

2. Pursuant to a decision of the Board (differently constituted) dated May 12, 2006, a representation vote was held on May 16, 2006. All of the ballots were segregated.

3. Subject to certain clarity notes, the Public Service Alliance of Canada (hereafter "PSAC" or the union) seeks to be certified for "all registered graduate students at the University of Western Ontario (hereafter "Western" or the employer) in the City of London employed

pursuant to a Graduate Research Assistantship". This decision addresses whether there are any employees in that bargaining unit.

4. The employer takes the position that a Graduate Research Assistantship (GRA) is a specific form of funding provided to some graduate students to permit them to pursue their studies; that graduate students are not "employed" pursuant to a GRA; and that accordingly there are no employees in the bargaining unit. The union by contrast takes the position that a Graduate Research Assistantship refers to graduate students doing research work not directed to their own thesis who receive funding through Western other than merit based scholarships, irrespective of the original source of that funding. Prior to final argument, the parties reached an agreement that work done as a Research Assistant (as distinct from Graduate Research Assistantship) was not included in the bargaining unit. (It is also convenient to clarify at the outset that work done as a Teaching Assistant is not included in the bargaining unit.)

5. Notwithstanding the agreed exclusion of Research Assistants, the union's use of the term Graduate Research Assistantship continues to be broader than Western's use of that term. The term, as used by the union, would include graduate students in receipt of funds other than what Western considers to be a GRA, such as for example a travel allowance. These other funds, however, appear to be a relatively minor source of funding. Thus, unless the context requires otherwise, the term Graduate Research Assistantship, or GRA, is used in the more limited sense used by the employer.

Facts

6. There was little dispute as to the facts. Counsel are to be commended for reaching various agreements which resulted in the evidence being presented to the Board in a relatively expeditious manner.

7. Western has about 32,000 students, most of whom are full time, a little over 1,100 full time faculty, not including its medical school, together with some external professors, and about 1,000 part time professors. It is organized into 11 faculties, plus a Faculty of Graduate Studies. The Faculty of Graduate Studies offers over 60 programs in all academic disciplines leading to master's and doctoral degrees.

8. There are two basic categories of graduate work at Western. Category one involves research work, at either a master's or doctoral level, typically resulting in a thesis. Category two graduate programs are courses of study at a master's level which result in professional degrees, such as a Master of Business Administration. Category two graduate students do not receive funding other than needs based bursaries, i.e. they do not receive GRAs.

9. The majority of Western's graduate students, about 3,000 in all, are engaged in category one type programs. Category one includes graduate students in lab based disciplines, like science, engineering and medicine, and in what typically are not lab based disciplines, like the arts and humanities and social sciences.

10. Category one graduate students may receive funding from or through Western by means of employment income or merit based scholarships, in addition to Graduate Research Assistantships, the nature of which is central to this dispute.

11. Western guarantees doctoral students a minimum level of annual funding equivalent to the cost of their tuition and $12,000 per year for the first four or five years of their doctoral program. The amount that a student is receiving from merit based scholarships and employment income from Western will first be tallied. If there is a shortfall then, within certain programs, the student will be awarded a Graduate Research Assistantship, or GRA. Western's position is that GRAs are a form of gap funding provided to honour its minimum funding commitment to graduate students.

12. Employment income may arise from employment as a Teaching Assistant (TAs), Research Assistant (RAs, as distinct from GRAs) or Graduate Student Assistant (GSAs). University policies provide that a graduate student cannot be employed more than ten hours per week in such campus employment. This expectation is also stated with respect to off campus employment, but only as a guideline due to Western's inability to police such employment.

13. TAs assist faculty in teaching undergraduate students. Since most undergraduate courses are offered in the fall and winter terms, relatively few TA positions are available in the summer months. TAs perform specified duties for a fixed number of hours per week, generally 10. Their compensation is directly related to the number of hours worked. TA income is treated by Western as employment income, subject to deductions. Western's TAs are, in fact, in another bargaining unit represented by the applicant union in this case. The union does not rely upon work performed by graduate students as TAs in support of this application.

14. RAs are employed to assist faculty with their own research. Some of this work may be of a fairly mundane nature, such as collating materials, some is more in the nature of research. RAs may, but need not be, graduate students: undergraduates or individuals who are not Western students at all or anymore may be employed as RAs. RAs perform specified duties for a fixed number of hours per week, generally 10. Their compensation is directly related to the number of hours worked. Graduate students working as RAs sign contracts of employment with Western. RA income is treated by Western as employment income, subject to deductions. The union initially sought to include the work performed by graduate students as RAs in this application, and some of the evidence of its witnesses related to work performed as an RA. However, as noted, the union agreed, on a without prejudice basis, that the RA work was not included in the bargaining unit applied for prior to final argument.

15. GSAs are a historical artifact, representing payments to graduate students for activities like proctoring exams. There are very few GSA employment opportunities and they are infrequent. GSA income is treated by Western as employment income, subject to deductions.

16. Merit based scholarships principally take the form of Federal Government Scholarships, Provincial Government Scholarships or Western graduate student scholarships. Federal Government Scholarships principally consist of awards from the Natural Sciences and Engineering Research Council (NSERC), the Social Sciences and Humanities Research Council (SSHRC) or the Canadian Institute for Health Research (CIHR). These awards range from $16,000/year to $30,000/year. Payment of the funds is administered by the university which the recipient is attending, in this case Western. These awards are made directly to the student and are portable, in the sense that if the recipient were to leave Western to continue their studies at another university, the recipient would continue to receive the award, provided they otherwise remained eligible.

17. Ontario Government Scholarships principally take the form of Ontario Graduate Scholarships (OGS). These awards are worth about $16,000/year. They are not portable. Payment of the funds is administered by Western.

18. Western graduate student scholarships derive from funds distributed by the Faculty of Graduate Studies to the various programs. The programs determine how best to assist their students with that money. Some are distributed as a named scholarship, some are distributed as what are now generically referred to as Western Graduate Research Scholarships, although different names have been used in the past and may continue to be used by individual programs. The Faculty of Graduate Studies, however, only permits these scholarships to be awarded to students who have an average of 78% or better and who are within an eligible funding period (or, as the parties sometimes referred to it, not beyond year "X"). The eligible funding period is one or two years at a master's level and four or five years at a doctoral level, depending on whether the student already has a master's degree.

19. GRAs are funded out of research grants faculty members have applied for and obtained. The applicants for, and recipients of, such grants are generally referred to as the "principal investigators". Major sources of such funds are NSERC and CIHR.

20. One criterion used by these entities in determining whether to award the grant is whether the principal investigators will provide training opportunities for up and coming researchers, i.e. graduate students. The general model is that graduate students work collaboratively with the principal investigator on some component of the overall research project. Each student's work product fulfills, in whole or in part, the research requirement of obtaining an academic degree. Although awarded to particular faculty members, these funds are also administered by the university.

21. Research grants of this sort are awarded primarily, although not exclusively, to lab based disciplines like science, engineering and medicine. As a practical matter, therefore, GRAs are generally available only to graduate students in those fields. Evidence was led with respect to an example of an exception to this general rule: funds from a SSHRC research grant to a professor in the Department of French to compile a Linguistic Atlas of the Iberian Peninsula were used to provide a GRA to graduate students.

22. Receipt of a GRA is not a pre-requisite to working on such grant funded research projects: a student whose academic research work is related to the research project may receive a GRA for none, all or part of his or her time at Western, and the amount of any GRA received may fluctuate widely from term to term, depending on whether the student is in receipt of funds from other sources.

23. Western pays students merit based scholarships and GRAs through its Human Resources Department, which handles its employment relationships. Its unchallenged evidence was that this arose from the introduction of software to deal with the "Y2K" problem: the HR component of the software was of primary importance and thus it was tested and installed first. Merit based scholarships and GRAs were incorporated into the payments handled by that system to ensure no disruption of funds.

24. Merit based scholarships are not employment income for the purposes of taxation, and no deductions are made. Western treats GRAs in the same manner.

25. Against this backdrop, I turn to the "work" which is the subject of this application. The university called one witness, Dr. Weedon, the Vice Provost of Western. The union called five graduate students and one professor as witnesses. There was very little dispute between the parties about what graduate students do, and the evidence of the witnesses was treated as representative. Both parties agree, and the evidence established, that graduate students were engaged in activities such as running tests, obtaining and examining samples, measuring and analyzing data, authoring papers, maintaining equipment and laboratories, ordering supplies and providing guidance or supervision to other students, both graduate and undergraduate. Some of this work was directly related to a given student's thesis, and some was not. It is the work not directly related to a given student's own thesis or own research the union seeks to capture by this application. Sometimes this work was referred to by the parties as "research work", notwithstanding the fact that it could include supervision of other students. In the balance of this decision, the terms "work" and "research work" are used to refer to the work which is the subject of this application and described in this paragraph, unless the context demands otherwise. It bears repeating that this work does not include any activities which a graduate student may perform as a TA or an RA.

26. Dr. Weedon testified, and Western's position is, that this work is performed by graduate students as part of their training to be independent researchers. He testified that ideally a graduate student's experience should include exposure to all of the things that they will have to do as an independent researcher. He stated that in lab based disciplines this includes understanding how to sustain a lab, to formulate research problems for investigation, analyze and collect data, and disseminate data through publication and conference presentation. He stated it can include exposure to teaching and training functions. He noted that training function can include interaction with more junior members of the research group, in other words sharing in the supervisory role. He also stated that it is not unknown for students to be exposed to the process of obtaining research funding, including working with their supervisor on acquisition of funds.

27. The union's position is that to the extent that this work does not directly relate to a graduate student's thesis, or more broadly, the graduate student's own research, it is in the nature of employment if the student receives compensation from Western that is not in the nature of a merit based scholarship, or income from employment as an RA or TA.

28. The evidence established, with exceptions discussed below in the analysis section, that the students performed the same research work whether or not they were in receipt of a GRA, and irrespective of the amount of the GRA. That is, students receiving funding in the form of merit based scholarships and employment income were expected to perform and did perform the same work as students whose funding came from a GRA, and a student who received no GRA at all one term, a small GRA another term and a full GRA in yet another term, was also expected to perform and did perform the same work in each term. Finally, some of the tasks performed were similar to the tasks that a graduate student employed as a TA or an RA would be expected to perform in that capacity. Conversely, the fact that a graduate student was employed as a TA or an RA did not relieve him or her from being required to perform this other work as a graduate student.

29. Finally, the evidence also clearly established that the work performed by graduate students was of value to the students' supervisors and to Western in creating knowledge and enhancing its reputation as a leading research university.

Argument

30. There was little dispute between the parties as to the applicable legal principles and for the most part, they directed the Board to the same cases. The dispute between the parties was about the application of those principles to the facts at hand.

31. Much of the Board's case law has been directed to distinguishing between the relationships of independent contractor and employees. The Board has had occasion, however, to consider the difference between volunteers and employees, and to consider whether an employment relationship has arisen within the educational context of graduate students at universities.

32. In *Calvano Lumber & Trim Co. Ltd.*, [1989] OLRB Rep. April 337 and *Corporation of the Town of Tecumseh*, [1998] Jan./Feb. 31 the issue was whether the individuals in question were employees or volunteers. In *Calvano*, and to a lesser degree in *Town of Tecumseh*, the relationship between the alleged employer and the individuals in question was casual, but in both cases the individuals received some form of compensation for their efforts. In *Calvano*, the Board stated:

> Employment relationships may exhibit a variety of forms in different contexts but the essence of such relationships is the exchange of labour for consideration in some form. Collective bargaining concerns the terms of that exchange and trade union representation permits even small groups of employees to improve them. It does not matter that an individual may not be "employed" or "paid" in a conventional way, nor does it matter that the alleged employee only works sporadically or shows up on the employer's doorstep and is engaged on a casual basis.

33. PSAC states that these cases establish that regardless of the form or unorthodox nature of things, an employment relationship is established if compensation is paid for work provided. Western notes that in *Town of Tecumseh*, which dealt with "volunteer firefighters", there were a number of other indicia of an employment relationship: a portion of the compensation paid bore a direct relationship to the time spent working; there was a formal recruitment process that assessed skills for duties to be performed; the employer provided training and testing to the individuals found to be employees; and the employer also imposed discipline.

34. This Board has considered the nature of employment relationships involving graduate students and universities in three reported decisions. While terms like "Teaching Assistants", "Research Assistants" and "Graduate Assistants" are used in each of these cases, it is important to bear in mind that the meaning given to those terms is not necessarily the same from case to case, or the same as used in the current case.

35. The first case was *York University*, [1975] OLRB Rep. Sept. 683 (September 16, 1975) (*York University No. 1*). The union applied for a bargaining unit which included "Teaching

Assistants" and "Graduate Assistants". The duties of the Teaching Assistants were similar to the duties of the TAs in this case and the Board held that they were employees. Of more interest for present purposes were the Board's findings with respect to the Graduate Assistants. The Graduate Assistants received an assistantship valued at $2,400 per annum. The assistantships stated that they were offered in exchange for a weekly time commitment from the student. The employer's evidence was that this was a guise adopted in order to access government support funds, and that the payments were really more in the nature of a bursary. Some graduate students performed tasks like collating of materials, others did very little work but continued to receive their assistantship. The Board stated (at p. 687):

> [T]he tasks performed by the Graduate Assistants, we find, are of a supernumerary or non-essential nature. In contrast to the normal employment relationship where the individual is hired to perform a generally pre-determined work task, the "jobs" are created only after the Graduate Assistants are appointed. Moreover, the superfluousness of these tasks is further enhanced when one considers that any vacancies in such classifications would, in the absence of these students, generally not be filled. In all of the circumstances, the Board is therefore drawn to the irresistible conclusion that the engagement of Graduate Assistants by the University involves essentially a "make work" scheme primarily designed to qualify these students for government-support monies in an effort to provide them with some financial assistance while pursuing their particular post-graduate course of studies.

36. Western argues that application of the same test to this case yields the same result: GRAs are a form of funding provided with little or no expectation of work, with the result that the recipient is not an employee. PSAC argues that this case is distinguishable on the basis that the research work of the Western graduate students is not superfluous and is acknowledged to be of value.

37. The second case was *Carleton University*, [1978] OLRB Rep. Feb. 179 (February 24, 1978). In that case the union applied for a bargaining unit of graduate or undergraduate students employed as Teaching Assistants. The employer took the position that they were not employees within the meaning of the Act, or in the alternative that Research Assistants should be included in the bargaining unit as well.

38. In addressing the employer's argument that the individuals were not employees within the meaning of the Act, the Board commenced by noting:

> Persons and institutions may obviously stand in more then [sic] one relationship to each other. Thus there is nothing inherently contradictory in the notion that an individual within a university may at once be a student and an employee of that institution. The fact that the work done as employee may complement and enhance the work done as student, or conversely, that the work done as student may qualify the person to act as an employee does not change that.

That observation, with which I agree, is an important point of departure between this Board's jurisprudence and some of the jurisprudence of the National Labor Relations Board of the United States of America, discussed further below.

39. At paragraph 16, the Board also observed that "the modern university is more than merely a teaching and degree granting institution". Among the other functions of the university is research. At paragraph 17, recognizing the role that students may have in this research, the Board stated: "It would, in our view, be unrealistic to maintain that students employed by the University to do research are not its employees merely because their work does not directly relate to teaching."

40. The Board went on to conclude that the evidence before it established that the Teaching Assistants and Research Assistants were employees within the meaning of the Act. The decision is more descriptive of the duties of the Teaching Assistants than of the duties of the Research Assistants. It appears, however, that both were expected to spend "approximately 10 hours per week on his or her work assignment" and both were "remunerated for their work and the quantity of their remuneration relates to the amount of work they do and their academic qualifications". In addition, the Board noted that a number of persons who were not students were employed as both Research Assistants and Teaching Assistants. All of these factors were referred to by the Board in arriving at its conclusion that the Research Assistants, and the Teaching Assistants, were employees within the meaning of the Act.

41. The Board then addressed the issue of whether the Research Assistants should be excluded from the bargaining unit. The union argued that they should be excluded on the basis that "Graduate Assistants" were excluded in *York University No. 1*. The Board distinguished that case on the facts, noting that case determined that the Graduate Assistants were not employees rather they "were, in effect, the beneficiaries of scholarships or bursaries in the guise of assistantships". Given its finding that the Research Assistants were employees within the meaning of the Act, the Board held that there was no reason to exclude them from the bargaining unit.

42. The third case was *York University*, [1981] OLRB Rep. May 601 (May 12, 1981) (*York University No. 2*). The union whose application for certification was rejected in *York University No. 1*, in so far as it related to Graduate Assistants, applied for a bargaining unit consisting of Research Assistants and Graduate Assistants. The employer argued that the matter was *res judicata*. The union argued that there had been a change in the underlying facts or in the alternative that *Carleton University* represented a change in the law.

43. *York University No. 2* held that the union had failed to establish a change in the underlying facts since *York University No. 1*. *York University No. 2* then proceeded to examine the effect of *Carleton University*. Given the conclusion that the underlying facts had not changed since *York University No. 1*, and given that *Carleton University* had distinguished *York University No. 1* on the facts, not surprisingly *York University No. 2* distinguished *Carleton University* on the facts.

44. Western relies on paragraph 11 of *York University No. 2*, which distinguishes *Carleton University* on the basis that the evidence in *York University No. 2* established there was little relationship between what the student was asked to do and the amount of the award allocated to the student. So in this case, it argues, the evidence establishes that there was little relationship between what graduate students in receipt of GRAs were asked to do and the amount that they received as a GRA at any particular time.

45. PSAC, by contrast, relies on paragraph 20 of *York University No. 2*. In that paragraph, the panel stated:

> The graduate assistantship programme, as the evidence makes plain, does not arise out of dependency on the part of the university on anyone for the carrying on of its functions. It is therefore basically not a matter of recruiting graduates to assist the university but, rather, a scheme devised to finance needy students in order to attract them to, and help them during their studies at the graduate school. It is very clear that the staff is required to think up tasks that could be used to justify the payment, of money to students in need and those whom the university wants to attract. The university does not have scholarship funds with which to attract students and uses the graduate assistants programme as the best substitute available. The fact is that the university is basically not offering jobs; it is offering money to help students and because of the legalities involved, offers the student an opportunity to fulfil a task in order to justify the money grant.

PSAC argues that *York University No. 2* effectively held that the payments were made as part of a "make work" project. By contrast, it argues the evidence establishes that the work done by the students was of value to Western.

46. Western also makes reference to *Hammell v. Canada (Minister of National Revenue – M.N.R.)*, [1994] T.C.J. No. 921. In that case a graduate student appealed a determination that a $20,000 annual stipend that he received from his university was employment income, and hence subject to deductions in respect of employee premiums under the Canada Pension Plan and what was then the Unemployment Insurance Act. The Tax Court allowed his appeal based on its findings of fact that: the purpose of the stipend was to permit the student to further his education; any supervision that he was subject to related to his studies and research as a graduate student; and he was not required to teach or do any work in the laboratory in order to receive the award.

47. PSAC filed copies of a number of certification decisions of the Quebec Commission des Relations du Travail. In each case a certificate is granted with respect to a group of teaching assistants, graduate assistants or research assistants "qui sont des salariés au sens du Code du travail". None of the decisions contain reasons. Further, the English interpretation of the Code du travail uses the term "employee" for "salarié". In the result, certification was granted for particular groups of graduate students "who are employees in the sense of the Labour Code". These decisions, thus, provide no guidance as to which graduate students are employees in the sense of the Quebec Labour Code. I do not find them to be of any assistance.

48. PSAC made reference to jurisprudence of the National Labor Relations Board of the United States of America in anticipation of the fact that the employer would rely upon it in its argument. While included in its casebook, Western did not rely on that jurisprudence. In my view, the NLRB jurisprudence is of no assistance. In essence prior to *New York University*, 332 NLRB 1205 (2000), the NLRB had taken the view that because graduate students are primarily students of a university, they cannot be employees of the same university. In *New York University*, the NLRB rejected that approach noting that "there is no basis to deny collective bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students." Instead, much like this Board, the NLRB simply addressed the question of whether the activities in question of the students brought them

within the common law definition of an employee. In *Brown University*, 342 NLRB 483 (2004), the Board reverted to its earlier approach. For reasons stated below, I decline to follow the approach now taken by the NLRB.

49. Finally, after the hearing, PSAC provided the Board with a copy of the decision of the Newfoundland and Labrador Labour Relations Board: *Teaching Assistants Union of Memorial University of Newfoundland v. Memorial University of Newfoundland*, [2007] O.L.R.B.D. No. 16 (October 12, 2007). The union sought certification for a bargaining unit of "graduate teaching assistants, graduate assistants, and graduate research assistants". The distinction among these various terms is not clear: it appears that "graduate assistant" was an omnibus term which included the other terms. In any event, the evidence established that students were required to work a specified number of hours performing tasks which were assigned. The amounts paid were subject to statutory deductions. The employer relied upon the NLRB decision in *Brown University*. The NLLRB declined to follow that decision, citing instead the decision of this Board in *Carleton University*, supra. The NLLRB also distinguished *York University No. 1*, on the basis that it was satisfied that the evidence before it established that the work performed was not a "make work" project, but of immediate and direct benefit to the university.

Analysis

50. As a starting point, it should be observed that the definition of "employee" contained in the Act merely states:

> "employee" includes a dependent contractor

That is, nothing in the Act states that the presence or absence of a particular factor establishes or negates the existence of an employment relationship. This Board has been guided by common law principles in determining what is included in the term employee. As the Board stated in *Loblaws Groceterias Co. Ltd.*, 66 CLLC ¶ 16,078 (cited in *York University No. 1*), at p. 886:

> The relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope of the duty undertaken. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the worker, although none of these factors is by itself conclusive. (*Halsbury's Laws of England*, 3rd, ed., vol. 25, pp. 47-448, emphasis added).
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> Whether any relation is that of a master and servant is entirely a question of fact in each individual case, depending upon the contractual connection established between the parties by the terms of the agreement creating it, and the law is not concerned with the terminology used by the parties but only with the nature of the relation which the parties intended, or in the absence of clearly expressed intention, must be deemed to have intended to create; and further than this,…the law attaches to parties the relation of master and servant in many cases where the parties had not [sic] intention of creating it, or where they

> expressly stated a contrary intention, or where for other purposes no such relation will be deemed to exist…
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> .....
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> (*Batt, Law of Master and Servant* pp. 2-3, emphasis added)

The essence of employment then, is that it is a contract "in which a person undertakes to serve another and to obey his reasonable orders within the scope of the duty undertaken".

51. As stated by the Board in *Carleton University*, "there is nothing inherently contradictory in the notion that an individual within a university may at once be a student and an employee of that institution." Stated differently, the fact that an individual is primarily a student of a university does not preclude a finding that the individual is also secondarily an employee of the university. I thus reject the approach taken by National Labour Relations Board historically, and recently re-adopted by that Board.

52. Having said that, the existence of the relationship of student to university cannot be ignored. The difficulty which arises is that the relationship of student to university as educator can bear many of the hallmarks of the relationship of employee to employer. That is, the educational relationship may explain the presence of what would otherwise be a hallmark of an employment relationship, and vice versa.

53. Direction and control is one hallmark of employment. Yet, the university, as educator, is entitled, indeed expected, to determine a course of studies and activities which a student must complete in order to be awarded his or her degree. The performance of work by the employee is another hallmark of employment. Yet, as anyone who has been a student knows, the completion by a student of studies and activities constituting part of the educational experience requires work. The production of something of value to the employer is another hallmark of employment. Yet the work product of graduate students generated through their academic activities is, as the evidence in this case established, undoubtedly of value to the overall reputation and standing of the university. The receipt of income is yet another hallmark of employment. Indeed, in this case, it was agreed that the income received by graduate students in return for their work as Teaching Assistants and Research Assistants was in the form of employment income. At the same time, the university also acts as a conduit of funding to students in its capacity as educator. Further, as demonstrated by this case, this funding may take many forms.

54. On the other hand, the absence of some of the hallmarks of employment does not negate what is otherwise an employment relationship. Thus, the mere fact that work produced by an individual in the course of employment has little or no value to the employer does not mean that the act of producing that work is not employment: having directed an employee to spend time performing work, it does not lie in the mouth of an employer to say that because the work is of no value to it, it is not employment. If, however, the employee stands in some other relationship to the employer, such as student to educator, the fact that the work is of little or no value to the employer may invite the inference that the performance of the work was the product instead of the educational relationship. It may be that *York University No. 1* and *York University No. 2* are best understood as hidden bursary cases, in which there was actually no expectation that

the recipients of the funds would perform any of the work notionally assigned to them. However, to the extent that *York University No. 1* suggests that individuals are not employees merely because work they are required to perform is in the nature of a "make work project", or *York University No. 2* suggests that individuals are not employees merely because a university is not "dependent" on the work that they are required to perform, I respectfully disagree.

55. Similarly, the absence of compensation for work does not negate what is otherwise an employment relationship: it simply means that the employee has a claim for unpaid wages. Thus, I do not understand *Calvano* or *Town of Tecumseh* to stand for the proposition that in the absence of compensation there can be no finding of employment, but only for the proposition that the presence of compensation is a hallmark of an employment relationship.

56. Western argues that if the employee and employer stand as well in the relationship of student and educator, the absence of compensation for work invites the inference that the individual performed the work in order to achieve his or educational objective. I agree. There is, however, an imbalance of power between educators and student. It is the university which determines many of the activities a student must undertake as part of the educational relationship, not vice versa. If a university directs a student to undertake work of no educational value, the student may feel that he or she has little choice but to comply. In such circumstances the work may simply represent uncompensated employment. Further, from the point of view of graduate students, the determination of what work is to be done is made by individual professors who may have tremendous influence over their future careers. The potential for abuse, intentional or otherwise, is manifest.

57. Within the context of this analysis, the union's position would require the assumption that only a graduate student's work on his or her thesis or own research has educational value to the student. I do not accept this proposition. The union's witnesses generally accepted that within the context of lab based disciplines, where collaborative research is the norm, there is something to be learned or gained from working with and supervising others and skills to be developed from maintaining and operating laboratory equipment which is not directly related to one's own research. The problem with respect to activities of this nature may be one of degree. There may come a point where the performance of this work can no longer be said to be of sufficient educational value to the graduate student, and its required performance gives rise to an employment relationship.

58. The union, however, applies only for graduate students "employed pursuant to a Graduate Research Assistantship". PSAC argues that to the extent that a graduate student engages in research activities not directly related to his or her thesis it constitutes work. Further, this work produces a research product which is of value to Western. The GRA represented payment of compensation by Western to the graduate students. Therefore, it argues, to the extent graduate students receive GRAs from Western, they are employees. Further, PSAC argues that the evidence shows that students in receipt of GRAs are expected to perform more of this non-thesis related work. PSAC confirms in final argument that it was only seeking bargaining rights with respect to employees in the bargaining unit applied for, and was not seeking, for example, graduate students performing the same activities while in receipt of only an NSERC.

59. PSAC argues that Dr. Weedon, Western's sole witness, had agreed that graduate students were expected to perform services for the university in return for receipt of Graduate

Research Assistantships. In my view Dr. Weedon's agreement was somewhat narrower: he agreed that in exchange for these funds graduate students are expected to work on their own theses and engage in other activities that are part of their training.

60. There was evidence of a student being required to repeatedly do routine testing in exchange for a GRA, in the broader sense that the union uses that term. The testing had no research value to the student, the university or for that matter the supervisor, but rather was done as part of contracts that the supervisor had with various external clients and did not fall within the educational relationship. Western described the situation as anomalous. PSAC stated that the union hoped the situation was atypical, but noted that it was the kind of thing which could and does happen. PSAC noted that this kind of activity was clearly in the nature of employment. I agree. Subsequently, however, the union specifically stated that it was not seeking to capture the performance of this kind of routine work in the bargaining unit for which it applied. Accordingly, this evidence is not relevant.

61. There was, however, clear evidence of one graduate student being required to do more "research work" in exchange for her GRA. Specifically, Christine Tenk testified that while she was in receipt of an NSERC she was, among other things, responsible for supervising the work of an undergraduate student. When her NSERC expired, she was provided with a GRA out of research funds obtained by her supervisors. She testified that her supervisor told her that she would have to do more work in order to earn this money. He directed her to do additional statistical analysis for him and also doubled the number of undergraduate students that she was supervising from one to two.

62. Western seeks to cast doubt on Ms. Tenk's testimony, noting that she holds a position with the union and argues that "she was highly motivated to support its position, without being dishonest". I am not persuaded that there is any reason to doubt Ms. Tenk's testimony. The mere fact that she holds a position in the union is not sufficient for me to draw this conclusion. It is perfectly plausible that her supervisor would consider the fact that Ms. Tenk's GRA came from his research grant permitted him to expect further work from Ms. Tenk. Further, I note that her supervisor was not called by Western to contradict her testimony.

63. I conclude, therefore, that extra demands were made of Ms. Tenk pursuant to her GRA. This additional work was not performed by Ms. Tenk as part of an educational relationship, but because she was told that she had to do it in exchange for her GRA. Her supervisors thus turned the relationship into one of employment with respect to that additional work. The union has established, therefore, that there is at least one employee in the bargaining unit for which it applied.

64. Notwithstanding Ms. Tenk's situation, however, it is clear that GRAs are a form of gap funding, paid to make up any shortfall between a level of income that Western assures graduate students they will receive while completing their studies and their income from all other sources. In general, there is no difference between the activities and tasks that the graduate students called as witness by the union are expected to undertake while in receipt of a GRA and the tasks which they are expected to undertake, and do undertake, when they are not. Further, with the exception of Ms. Tenk, Western established that there was no correlation between the receipt of a GRA and the performance of the particular tasks relied upon by the union as illustrative of the work performed by the students it called as witnesses.

65. These students may be employed by Western with respect to the performance of some of the work that they are required to do, but they are not employed pursuant to a GRA. Put another way, to the extent that these students are employees of Western, that employment relationship is not usefully defined by reference to receipt of a GRA. Their inclusion in a bargaining unit on that basis would result in their inclusion in a month that they happened to receive a GRA, but exclude them the next month with respect to the performance of the same work because they were no longer in receipt of a GRA. For this reason, the bargaining unit applied for by the union would not appear to be appropriate.

66. This matter is remitted to the Manager of Field Services to arrange a meeting with the parties. If the parties are unable to reach an agreement a further hearing may be scheduled for the purposes of hearing submissions on the bargaining unit description.

67. I am seized.

1252-05-R Labourers' International Union of North America, Local 625, Applicant v. **Vansmit Ltd. o/a Jay-Dee Concrete Forming**, Responding Parties

Certification – Construction Industry – Unfair Labour Practice – The employer alleged in post-vote representations that the union had engaged in misconduct that affected the employees' expression of their true wishes – The Board found that: (1) an employee's statement that the union "took care of" him was ambiguous; (2) the provision of travel expenses, overnight accommodation and unlimited food and drinks to the employees by the union to secure the employees' votes did not amount to intimidation or coercion; (3) the union's offers of premium employment to one of the employees was not improper; (4) a threat to cause an employee's discharge was a type of economic intimidation – Matter set down for hearing to hear *viva voce* evidence on the final allegation

BEFORE: *Jack J. Slaughter*, Vice-Chair.

DECISION OF THE BOARD; November 1, 2007

1. This is a certification application filed by Labourers' International Union of North America, Local 625 ("Local 625") against Vansmit Ltd. o/a Jay-Dee Concrete Forming ("the Employer") pursuant to the construction industry provisions of the *Labour Relations Act, 1995* S.O. 1995 c.1 as amended (the "Act").

2. By decision dated July 24, 2007, the Board (differently constituted) gave effect to Minutes of Settlement entered into by the parties with respect to this file. The essence of the parties' agreement was that all outstanding issues would be deemed resolved and both parties would abide by the result of the representation vote to be directed by the Board. The Board accepted this agreement and directed that a representation vote be held on July 27, 2007.

3. At the vote, 13 ballots were cast. Seven ballots were cast in favour of Local 625 and six ballots were cast against.

4. In post-representation vote submissions, the Employer alleged Local 625 had engaged in misconduct that should cause the Board to either dismiss this certification application, or alternatively to order a further representation vote.

5. By decision dated September 12, 2007, this panel of the Board directed the parties to file submissions with respect to the Employer's allegations. Those submissions have now been received, and the Board's decision on the effect, if any, to be given to those allegations is set out below.

THE ALLEGATIONS

6. The Employer makes a number of allegations of misconduct against Local 625. They may be summarized as follows:

> (a) Jon Baker remarked about Local 625 that "they found me and took care of me". This is said to mean that Local 625 promised payments or employment in "Union controlled jobs" to Mr. Baker. It is alleged similar payments and promises were also extended to Jessie Ladouceur, James Briand, Donato Bittacola, Jeff Lesperance, Jamie Carroll and Ben Trupish.
>
> (b) Local 625 threatened to cause the termination of Jamie Carroll unless he attended at the vote and voted in favour of Local 625.
>
> (c) Local 625 provided travel expenses, overnight accommodation, plus unlimited food and drinks "for attending and voting in favour of the Union" to the 7 employees named above while not offering similar treatment to the other 6 employees.
>
> (d) Local 625 offered employment at Union jobs to the 7 employees named above.
>
> (e) Local 625 offered "premium employment or to facilitate a business venture" for Corrado Naccarato in exchange for his vote, and urged him not to vote when he did not accept Local 625's offer.

LOCAL 625'S POSITION ON THE ALLEGATIONS

7. Local 625 submits that the Employer's allegations do not disclose a *prima facie* case that there has been a violation of the Act by Local 625, and accordingly that the Employer's request for section 11.1 relief should be dismissed.

8. In some instances, Local 625 agrees with the content of certain statements alleged to have been made, but disagrees with the effect or implication of those statements. In other instances, Local 625 disputes the statements or conduct alleged, and gives an alternative version of the facts. Where Local 625 admits specific events, it says those events do not amount to violations of the Act.

ANALYSIS AND DECISION

9. This is a certification application. A cardinal principle of the Act, expressed at section 2, clause 1 is:

> to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

10. The Board's approach to the processing of certification applications generally, and this application in particular, should be guided by this cardinal principle. Trade unions, employers, and employees all have statutory rights protected by the Act. These rights are not symmetrical, however. Section 70 of the Act places specific restrictions on employer conduct only as follows:

> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Underlying this provision is the Ontario Legislature's recognition that an employer's superior economic position and control inherently lends significant import to its view: see George W. Adams, *Canadian Labour Law* (Aurora, Canada Law Book, looseleaf) at section 10.7.

11. No parallel provision dealing with "interference" exists for union or employee activities. All labour relations participants, though, are enjoined from partaking in intimidatory or coercive behaviour by section 76 of the Act which provides:

> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

12. It must be noted that in drafting sections 70 and 76, the Ontario Legislature clearly differentiated "promises" and "undue influence" from "intimidation" and "coercion". Employers are required to adhere to a higher standard of conduct due to their significant control over their employees' economic lives.

13. In assessing the Employer's allegations, the Board must be sensitive to separating trade union conduct or activity that may legitimately advance its interests, and those of the employees it seeks to represent, from conduct or activity that is truly intimidatory or coercive.

14. On the other hand, where allegations speak to intimidatory or coercive conduct, a *prima facie* case is made out where the allegations are sufficient to render it reasonable or arguable to reach a conclusion that a violation of the Act has occurred: *Caravelle Foods*, [1983]

OLRB Rep. June 875; *The County of Brant*, [2000] OLRB Rep. Nov./Dec. 1106 (November 15, 2000). In deciding whether there is a *prima facie* case of a violation of the Act, the Board assumes the facts stated in the allegation are true and can be proved: *General Motors of Canada Ltd.*, [2001] O.L.R.D. No. 1672 (April 30, 2001); *City of Ottawa*, [2006] O.L.R.D. No. 168 (January 17, 2006); Rule 39.1 of the Board's Rules of Procedure.

15. The Board has considered the meaning of the terms "intimidation and coercion" on several occasions over the years. In *Saverio A. Greco*, [1976] OLRB Rep. June 323, the Board stated that a violation of section 76 occurs "the moment a person 'seeks' to compel another to do one of the acts set out in the section". In *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219 (February 21, 1985), the Board held that "for intimidation or coercion to be established, there must be a threat or other intimidating or coercive action coupled with an express or implied demand that a person (for example) refrain from exercising a right under the Act or from performing an obligation under the Act". The *Sutherland* definition was adopted and followed in *Ontario Hydro*, [1985] OLRB Rep. Feb. 307.

16. The cases cited by counsel for the Employer do not derogate from the definition the Board has applied for the past 30 years. In *Baron Metal Industries Inc.*, [2001] OLRB Rep. May/June 553 (June 5, 2001), the Board spoke of intimidation as "concerning threats of physical violence or some other unlawful means". In *Citipark Inc.*, [1996] OLRB Rep. May/June 367, the Board focused on whether the impugned acts "improperly affected the voluntary expression of the wishes of any employee" and found that a union representative stopping employees and talking to them outside the building in which the polling station was located did not engage in intimidation or coercion. In *Bridgeline Rope Inc.*, [1998] O.L.R.D. No. 3692 (September 21, 1998), the Board declined to find that a "joke" made by a person alleged to be acting on behalf of the employer that the employees could pay him the equivalent of union dues and he would take the union's key inside organizer to dinner to discuss problems in the workplace amounted to intimidatory or coercive action. The British Columbia case of *Sunwest Food Processors Ltd.*, [2000] B.C.L.R.B.D. No. 436 also emphasizes that the labour relations context is critical, and notes that intimidation in its ordinary dictionary sense means "to frighten or overawe; to inspire with fear, to coerce; or to deter with threats". Similarly, *Cardinal Transportation B.C. Inc.*, [1996] B.C.L.R.B.D. No. 344 defines coercion with reference to "some form of force, threat undue pressure, or compulsion for the purpose of controlling or influencing an employee's freedom of association".

17. However, a threat to a person's continued employment has been consistently held to be intimidation or coercion prohibited by section 76 of the Act: *L. M. Welter Limited*, [1965] OLRB Rep. April 34; *Intermodal Marine Surveys Ltd.*, [1979] OLRB Rep. April 321; *T & F Construction Equipment Rental Limited*, [1983] OLRB Rep. December 2116; *Bruno Plumbing & Contracting Inc.*, [1994] O.L.R.D. No. 3905 (October 26, 1994).

18. The Board will now apply these principles to the facts of this case.

19. The allegation that an employee stated that a trade union "took care of him" is not enough to constitute an allegation of intimidation or coercion under the Act. That short statement is capable of many meanings, or nuances of meaning. An ambiguous statement standing in isolation does not make out a *prima facie* violation of the Act: *R. M. Belanger Ltd.* 2006 Can LII

30247 (ON L.R.B.) (August 29, 2006), reconsideration denied 2006 Can LII 39120 (ON L.R.B.) (November 17, 2006).

20. Next the Board will assume Local 625 did pay travel expenses, fund overnight accommodation, buy food and drinks, find union jobs and pay reimbursements of lost wages to employees who voted in this matter. None of the alleged behaviour amounts to compulsion, a threat of physical violence, or a threat of loss of employment. All of it amounts to propaganda, electioneering and encouragement to union supporters in the broadest sense. Once in the polling booth, the individual voter is free to exercise his freedom of choice. Nothing in these alleged acts amounts to the use of an "element of force or aggression" as another panel of the Board put it when dismissing similar allegations made against Local 625 in *B.T.A. Concrete Inc.*, 2004 Can LII 5604 (ON L.R.B.) (July 21, 2004). This panel adopts the reasoning in *B.T.A. Concrete* and hereby dismisses the Employer's allegations summarized at paragraph 6 above in items (a), (c), and (d).

21. The allegations with respect to Mr. Naccarato in paragraph 6, clause (e) must be similarly dismissed. There is nothing improper in Local 625 offering him "premium employment" or other assistance in getting work. This is what construction industry trade unions do. The mere urging of Mr. Naccarato not to vote is not a violation of the Act in itself either. Such conduct standing alone falls within the rubric of electioneering.

22. The threat to Mr. Carroll's employment in paragraph 6, clause (b) stands on a different footing. This is clearly the type of economic intimidation and coercion prohibited by section 76 of the Act. Local 625 denies it engaged in any such conduct, and puts forward an alternative version of the facts from that asserted by the Employer. Nevertheless, the Board cannot determine the truth or falsity of the allegation based only on the pleadings of the parties. This allegation is significant enough to merit a hearing where *viva voce* evidence will be heard from both parties and the issue finally determined thereafter.

23. For all of the foregoing reasons, the Employer's allegations set out in paragraph 6, clauses (a), (c), (d), and (e) are hereby dismissed.

24. The Board directs the Registrar to schedule this matter for hearing only with respect to the issue of the alleged threat of termination to Mr. Carroll's employment.

25. This panel is seized of this matter.

1343-07-R Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Victor Chadi o/a Victor Hugo Drywall**, Responding Party

Certification – Construction Industry – Practice and Procedure – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but

refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *Inna Koldorf* and *Ivan Kovac* appearing for the applicant; *Keith Burkhardt/Betty Psarris* and *Victor Chadi* appearing for the responding party.

DECISION OF THE BOARD; December 3, 2007

1. This is an application for certification which the applicant has elected to have dealt with pursuant to the provisions of section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act"). The applicant is Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (the "Union"). The responding party is Victor Chadi o/a Victor Hugo Drywall (the "Company").

2. Pursuant to the Board's (differently constituted) decision dated October 19, 2007, the first issue to be determined in this matter relates to the response to this application which the Company filed with the Board on August 2, 2007. Both parties agree that this response was filed late but they vehemently disagree as to whether or not, in the circumstances of this case, the Board should exercise its discretion to allow for the late filing of the response and/or should exercise its discretion to consider the late filed information set out therein. This decision deals with those issues.

The Facts

3. At the hearing the parties were able to agree upon all of the relevant facts which they wished to rely upon for the lateness issue.

4. This Company is a drywall contractor carrying on business in the construction industry in and around Toronto.

5. This application was filed with the Board on July 17, 2007 and was delivered to the Company, along with the various other documents required by the Board's Rules of Procedure, on the following day, July 18, 2007. Accordingly, pursuant to Rule 25.5 and section 128.1(3) of the Act, the Company should have filed its response with, and provided the information concerning the employees in the bargaining unit required by the Act to, the Board by no later than 5.00 p.m. on July 20, 2007. Obviously, as set out above, it did not do this.

6. On July 26, 2007, the owner of the Company, Mr. Victor Chadi, phoned the Union and spoke with one of its representatives, Mr. Ivan Kovac. The parties agreed that the subject of this phone call was the Union and its attempt to organize the Company. Whatever else may have been said (or not said) in their phone conversation, it was agreed that Mr. Chadi told Mr. Kovac that he was not interested in becoming a unionized contractor and Mr. Kovac told Mr. Chadi that he should consult with a lawyer right away.

7. On July 26, 2007, the Union advised the Board that the Form C-33, Notice to Employees, had not been posted at the job site as required. This resulted in a Board decision, dated July 27, 2007, noting that the Company had failed to file a response and/or provide the required section 128.1(3) information and containing a direction to the Company to immediately make the required postings. The Company was ordered to advise the Board that it had complied with its posting obligations by no later than 5.00 p.m. on July 31, 2007.

8. On August 2, 2007, the Company, through its counsel, filed its response with the Board which included a Schedule "A" listing the employees in the bargaining unit on the date of application. Prior to filing it with the Board, a copy of the response, including the Schedule "A", was delivered to the Union. The copy of the response which was filed with the Board was accompanied by a covering letter in which the Company took the position that there were individuals other than those listed on the Schedule "A" who were performing drywall work on the Company's job site on the date of application but that they were employees of an independent, *bona fide*, subcontractor and were therefore not employees in the bargaining unit. For some reason this covering letter was not provided to the Union along with the response. The Union only received a copy of this letter (and thus only became aware of the Company's positions set out in it) on August 7, 2007.

9. Subsequent to the filing of the response both parties filed submissions with the Board concerning the lateness issues. Thereafter, in a decision dated August 21, 2007, the Board (differently constituted) referred this matter to a Regional Certification Meeting. It was following that meeting, and following the receipt of additional submissions from the parties, that the Board issued its decision of October 19, 2007, referring this matter to hearing in order to deal with the preliminary issues concerning the late filed response.

Positions of the Parties

10. In its submissions the Company asserts that its response was not filed in a timely manner as Mr. Chadi, who it claims is not proficient in English, did not understand what he was required to do. The Union agreed that Mr. Chadi's first language is not English but takes the position that this does not justify lateness and it also disputes the Company's assertion that Mr. Chadi did not understand what the materials he received from the Union and the Board concerned.

11. In its response the Company took the position that there were two employees at work in the bargaining unit on the date of application. One of these individuals, Mr. Alejandro Zuluaga, is challenged by the Union as not being at work and/or not performing bargaining unit work on the date of application and/or as being a managerial employee pursuant to section 1(3)(b) of the Act.

12. The Union claims that there were two additional employees at work in the bargaining unit on the date of application: Mr. Livio Burcul and Mr. Steve Boras. The Company claims that these two individuals, although at work on its job site on July 17, 2007, were not its employees but are in fact the co-owners of BDV Construction, a *bona fide* independent subcontractor which it had engaged to perform certain drywall work.

13. Both parties agree that the Board has the discretion to allow for the late filing of a response and/or to consider late filed information which an employer is required to file pursuant to section 128.1(3) of the Act. The Union asserts that the Board should decline to exercise its discretion in these circumstances. Conversely, the Company argues that the Board should exercise its discretion in order to allow it to advance its positions concerning all three of the individuals whose status it wishes to put in issue or, in the alternative, to allow it to advance its positions concerning Mr. Burcul and Mr. Boras, at the very least.

Decision

14. As it is set out above, the Company is seeking the exercise of the Board's discretion in order to allow it to pursue two quite qualitatively different and legally distinct positions with respect to employee status. Accordingly, I will deal with these two positions, concerning Mr. Burcul and Mr. Boras on the one hand and Mr. Zuluaga on the other hand, separately.

Burcul and Boras

15. In the case of Mr. Burcul and Mr. Boras, the Company claims that they are not its employees and are in fact "strangers" to the bargaining unit. This position is then identical to the position which the Board dealt with in *Easton's Group of Hotels Inc.*, [2006] O.L.R.D. No. 2940 (August 9, 2006), in which it stated:

> 15. Both statutory construction and labour relations policy support the conclusion that subsection 128.1(3) of the Act should not foreclose the Board's consideration of the information it deems appropriate in order to determine if a named responding party is the employer of those individuals working in the proposed bargaining unit.
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> 16. The obligation to supply "the names of employees" under subsection 128.1(3) of the Act plainly rests only upon those employees' employer. Thus, the question whether the entity named as a responding party is the employer does not fall within the scope of the information required under subsection 128.1(3) of the Act. Accordingly consideration of such allegations delivered beyond the time limits specified in Rule 25.5 depends upon the exercise of the Board's discretion under that Rule 40.7.
>
> 17. This conclusion is not only consistent with the language of subsection 128.1(3) of the Act, it reflects the Board's approach to this issue in the context of applications for certification where the applicant cannot or has not made the election under subsection 128.1.
>
> 18. The labour relations benefits of prompt delivery of the names of employees, and making objections to the applicant's proposed bargaining unit is supported by both subsection 128.1(3) of the Act and the Board's refusal to exercise its discretion under Rule 40.7 to receive such information beyond the time limit specified in Rule 25.5. (see *Iori Plaster & Drywall Contractors Ltd.*, [1997] O.L.R.D. No. 4411 and thereafter cited with approval and further elaboration in *Summit View Homes Ltd.*, [2001] OLRB Rep. Sept./Oct. 1282; *High Performance Drywall Inc.* [2003] O.L.R.D. No. 488; *Ghods Building Inc.* [2004] OLRB Rep. March/April 275). However, the concern of the Board with respect to information that denies the asserted

> employer relationship with those in the proposed bargaining unit is the possible risk "strangers" to the responding party would decide through their ballots "whether or not the union would receive a certificate to represent employees of a (named) employer." (see *New Generation Group (c.o.b. Leaside Mews Inc.)*, [1998] OLRB Rep. November/December 990)
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> 19. This concern ought to be the same under subsections 128.1(3) and (4) of the Act, although related to counting cards rather than ballots, because the same notion of "strangers" determining the outcome of an application is equally unacceptable. The Board is required to consider whether it ought to exercise its discretion under Rule 40.7 to extend the time limit for filing such information. Given that the Easton's letter is only a few days late and that the applicant's did not allege that it suffered any prejudice due to this delay, the Board is prepared to extend the time limit for filing the responding parties' letter of June 9, 2006.

16. Unlike the situation in *Easton Group of Hotels Inc., supra*, the Company's delay in this case was significantly more than "a few days" and the Company's explanation for the late filing of its response is insufficient to justify its complete lack of timely action. Nevertheless, given the nature of the position which the Company is seeking to advance with respect to Mr. Burcul and Mr. Boras, these two factors are not determinative.

17. Irregardless of the various considerations which are, or may be, utilized in determining which particular employees "count" for the purposes of any particular application for certification, the entire scheme of labour relations established by our Act is based on the fundamental principle that it is always employees, rather than others, who choose the bargaining agent. The Board has consistently held, in cases such as *New Generation Group*, [1998] O.L.R.B. Rep. Nov. 990 and *Lee Construction Corp.*, [2003] O.L.R.D. No. 499 (February 18, 2003), that the possibility of "strangers" deciding whether a union will be certified as the exclusive bargaining agent of the employees of an employer raises concerns which go beyond the narrow and exclusive interests of the particular union and particular employer involved. Rather that possibility raises broader concerns which relate directly to the overall integrity of the certification process established by the Act. In this respect the Board stated as follows in *New Generation Group, supra*:

> 18. Here, though, the situation is different, and in a significant way. The responding party asserts that the two persons which the applicant listed as eligible voters are not even its employees. On the basis of materials filed with the Board (though, we caution, not yet identified or attested to, or cross-examined upon), there appears to be, at the very least, a legitimate *prima facie* question as to whether Messrs. Hoskins and Augot were actually employed by the responding party on the certification application date. We are troubled by the prospect of applying the Board's Rules in such a manner as to potentially permit for the determination of this application for certification as against the responding party by persons who may not be employed by it. Although it is offensive for a responding party to an application for certification to place a trade union in a difficult position by failing to file a timely and complete response to that application, it is no less offensive to apply the Board's Rules in such a way as to permit two strangers to decide whether or not a trade union ought to receive a certificate to represent employees of an employer.

18. It is for this reason that, what ever its significance in other situations, the mere insufficiency of the Company's explanation for its delay cannot be the determinative factor for the Board's decision concerning the exercise of its discretion in situations where the "stranger" issue has been raised.

19. Here, there is no question that the response was late by a number of days. However, I do not find that, in these particular circumstances, the simple passage of time has in fact resulted in such significant prejudice to the Union that it should outweigh the concerns raised by the possibility of strangers, rather than employees, being the source of bargaining rights. As noted above, under section 128.1(3) of the Act and Rule 25.5 an employer is only required to list its "employees" and, therefore, even if a timely response had been filed, based on the Board's normal procedures the Company would still have only been formally required to set out its position concerning Mr. Burcul and Mr. Boras to the Union at and/or immediately after the Regional Certification Meeting.

20. Further, the factual evidence which the Union is required to gather and evaluate in order to litigate the issue of Mr. Burcul's and Mr. Boras' status is not particularly time sensitive. It is agreed that these two men were performing bargaining unit work on the Company's job site on the date of application. The only question which must be determined is the fundamental nature of their relationship with the Company: specifically were they dependent or independent contractors? Determining that question involves evidence which goes well beyond what happened on the job site on July 17, 2007, and may well involve evidence concerning their work activities over a number of years. Accordingly, in this situation the Union is not as significantly prejudiced by being unable to start its investigation and collection of evidence immediately following the two-day response period as it would be if the factual disputes raised in the late filed response concerned evidence which is time sensitive in nature.

21. Finally, it must be noted that this situation is different from those which the Board dealt with in the two cases involving "strangers" relied upon by the Union. Both *Western Ontario Drywall Ltd.*, [2007] O.L.R.D. No. 4051 (September 28, 2007) and *Vaz (c.o.b. Vaz Drywall),* [2006] O.L.R.D. No. 3380 (September 15, 2006) involve requests for reconsideration. Accordingly, the "burden" to be met by those employers was different from that which exists here where no certificates have been issued, as the Board made clear in *Vaz (c.o.b. Vaz)* for example:

> 15. One added feature in each of these cases, as in this one, is the fact that a certificate had been issued. The issuing of a certificate alters certain legal relationships. In applications in the construction industry, to which section 128.1 applies, a certificate binds the employer and the union to the provincial collective agreement in the industrial commercial and institutional sector. If there are outstanding accreditation orders in other sectors for that area, the employer may be bound to other collective agreements as well. In seeking reconsideration a responding party is asking the Board retroactively alter certain legal rights and relationships. It is certainly possible to do so, but the consequences of revoking a certificate are such that there is a heavier burden of persuasion on a party seeking reconsideration then would be the case if no certificate had been issued.

Zuluaga

22. The analysis with respect to the Company's position concerning Mr. Zuluaga is, however, completely different and in all of the circumstances of this case, I find it would be inappropriate to exercise my discretion as the Company has requested and I decline to do so.

23. According to the Company, Mr. Zuluaga was an employee at work in the bargaining unit on the date of application. As such he should have been listed on the Schedule "A" which should have been provided to the Union by July 20, 2007. As noted above, the Company has failed to advance a reason which even comes close to justifying its complete lack of any timely action in this matter. Leaving aside all of its other failings, this Company even failed to act expeditiously after Mr. Kovac had advised Mr. Chadi to consult with a lawyer "right away".

24. Further, the nature of the dispute between the parties as it relates to Mr. Zuluaga means that the Union has been significantly prejudiced by the Company's delay. Had a timely response been filed, the Union would have had the opportunity to immediately begin investigating if Mr. Zuluaga was in fact at work, and doing bargaining unit work, on the date of application. Time is clearly of the essence in any such investigation and therefore, as the Company did not provide the Union with its response until almost two weeks after the two day deadline, there is no question that the Union's ability to carry out any such investigation has been significantly impaired.

Conclusion

25. Accordingly, the Board will exercise its discretion in this matter but only to the extent necessary to allow the Company to advance the position that Mr. Burcul and Mr. Boras were not its employees.

26. The responding party is directed to post copies of this decision immediately, in a conspicuous location(s) where it is likely to come to the attention of the employees affected by this application. These copies must remain posted for a period of 30 days.

27. This matter is referred to the Registrar to schedule a hearing.

2008-07-M The International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC), Applicant v. **Wallaceburg Preferred Partners Corp.**, Responding Party

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The

employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell, Gord Lilley, Joe De Roeven, Karie Vankerkhoven, Julie Vankoughnett* and *Stuart Hamblin* for the applicant; *Jonathan Cocker, Dan Brown, Ann Marie Alexander, Dan Marshall, Laurie, VanCouter* and *Jake Van Campen* for the responding party.

DECISION OF THE BOARD; December 3, 2007

1. This is an application for interim relief under section 98 of the *Labour Relations Act, 1995*.

2. On February 11, 2007, the International Union United Automobile Aerospace and Agricultural Implement Workers of America filed an application under section 96 of the Act alleging that Wallaceburg Preferred Partners Corp. (the employer or "WPP") had discharged one employee and intimidated two other employees for organizing activities contrary to the Act (Board File No. 3541-06-U). On February 27, 2007, the union applied for remedial certification pursuant to section 11 of the Act with respect to certain employees of the employer, relying on the allegations in its unfair labour practice complaint (Board File No. 3715-06-R). Both of those applications are ongoing. Those applications (hereafter the "main applications") were amended by leave of the Board on October 26, 2007 to include further allegations, summarized below. The present application for interim relief relates to those further allegations. Principally, it seeks an order directing the employer to reinstate certain laid off employees by date of hire.

3. The employer is in the business of sub-assembling parts and components for the heavy trucking industry. Its sole customer is International Truck and Engine Corporation Canada (ITEC). On March 1, 2007, the employer laid off 45 employees as a result of a reduction in demand from ITEC. There is no dispute as to the *bona fides* of the lay-off.

4. The union states a plant meeting was held on February 14, 2007 at which the plant manager, Dan Brown, advised the employees of the impending lay-off and indicated that they would be recalled on the basis of seniority. The employer states that there were two plant meetings with respect to this issue. It states that the first was on February 12, 2007. At that time, Mr. Brown advised the employees of his current understanding: that the lay-off was anticipated to be temporary and that employees would likely be recalled on the basis of seniority. As a result of new information from ITEC, Mr. Brown held a second plant meeting at which he advised the employees that the lay-off would be permanent. He denies that at the second meeting he promised the employees, either expressly or by implication, recalls would be on the basis of seniority.

5. There is no dispute that the 45 most junior employees, on a plant-wide basis, were given notices of lay-off. Some of these employees were not laid off, as other employees volunteered to be laid off instead. Among the employees involuntarily laid off was Karrie Vankerkhoven, one of the two employees the union had originally asserted was subject to intimidation for organizing activities on behalf of the union.

6. In or about September 2007, three of the individuals who had been laid off, Jake Van Campen, Laurie Van Couter and Ren MacKinnon, resumed employment with the employer.

7. The union states that they were recalled out of order of seniority contrary to the representation that was made to the employees in February 2007. It states this constitutes a violation of the statutory freeze.

8. The employer states that the employment of all 45 laid off employees had been terminated by virtue of the operation of the *Employment Standards Act, 2000* once the lay off lasted longer than 13 weeks. Accordingly it states that the three individuals were new hires. They were hired to fill specific vacancies. Mr. Van Campen, who was one of the more senior employees who had elected to be laid off in March, had previously held the position of janitor and was hired to fill a need for an experienced janitor. Ms. Van Couter and Mr. MacKinnon had previously worked in "Pool 25", a particular sub-assembly function. They were hired to fill unexpected vacancies in Pool 25. Because of the unexpected nature of these vacancies, the employer states it sought employees with experience in Pool 25. There is no dispute that of the employees laid off on March 1, 2007, Ms. Van Couter and Mr. MacKinnon were the most senior with experience in Pool 25.

9. The union states that in failing to recall laid-off employees in order of plant wide seniority the employer has acted contrary to the representation given to the employees in February, 2007. Further it argues that by avoiding reinstating employees by seniority, the employer is able to play favourites and hire new employees, not familiar with the union and its organizing drive. It states that in addition to Ms. Vankerkhoven, a known union supporter, a significant number of other union supporters were laid-off. There is no dispute, however, that even if employees had been recalled on the basis of plant-wide seniority to fill the three positions, Ms. Vankerkhoven would not have had sufficient seniority to be recalled.

10. While denying that it had any obligation to recall on the basis of seniority, the employer notes that seniority can be applied in a number of bases, and that Ms. Van Couter and Mr. MacKinnon were the most senior laid off from Pool 25.

11. When Mr. Van Campen, Ms. Van Couter and Mr. MacKinnon were laid off, they were paid at a rate of $14.01 per hour. When they first resumed employment with the employer they were paid at a rate of $13.01 per hour. The union states that this constitutes a reduction in wage rate during the statutory freeze period for which the consent of the union was neither sought nor obtained. The employer states that in accordance with its practice these individuals were hired at a lower rate and then advanced to the higher rate.

12. In September 2007, the employer also placed an advertisement in a local paper for "temporary" employees. Ms. Vankerkhoven responded to the advertisement and did not get a response from the employer. The union states that the introduction of the concept of a

"temporary" employee constitutes a violation of the statutory freeze and that in any event the employer should first have contacted the laid off employees to offer them employment. The employer states that it advertised for temporary employees because its information at the time from ITEC was that there might be a temporary increase in production. It states that no confirmation of increase has been received from ITEC and that in fact no further employees have been hired.

13. The union states that the employer's failure to first solicit interest from the pool of laid off employees, who were experienced and proven, is irrational, and inconsistent with the fact that it contacted Mr. Van Campen, Ms. Van Couter and Mr. MacKinnon because of their past experience. It does not dispute, however, that to date no further employees have been hired.

14. The union filed the first of its letters seeking to add these additional particulars to the main applications on September 20, 2007.

15. The present application for interim relief was filed by the union on September 21, 2007. The application and the employer's response thereto set out the above facts, with declarations from numerous individuals in support. The union seeks the following interim relief:

> 1. An order that WPP immediately offer reinstatement to each of the 45 employees it laid off on March 1, 2007, according to their dates of hire, as and when work becomes available.
>
> 2. So that the union may monitor WPP's compliance with the first order, an order that WPP provide the union immediately and on an ongoing basis:
>
>   i. The dates of hire of all production employees it included in its response to the application for certification;
>
>   ii. Notice in advance of any hiring, the number of vacancies it intends to fill and the names of laid off employees who will be contacted by WPP and offered those vacancies;
>
>   iii. A report of the results of each offer of employment made by WPP, and the names of the employees who accepted the vacancies;
>
>   iv. The telephone numbers and addresses of all laid off employees.
>
> 3. An order directing the posting of the decision.
>
> 4. An order directing the posting of a Notice to Employees with respect to their rights.

16. The relevant portions of section 98 state:

> **Board power re interim orders**
>
> **98.** (1) On application in a pending proceeding, the Board may,

> (a) make interim orders concerning procedural matters on such terms as it considers appropriate;
> (b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate; and
> (c) subject to subsections (2) and (3), make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered or who has been subject to reprisal, penalty or discipline by the employer.
>
> **Same**
> (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:
> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
> 2. There is a serious issue to be decided in the pending proceeding.
> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
> 5. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> **Same**
> (3) The Board shall not exercise its powers under clause (1) (b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> **Same**
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.

17. Section 98(3) is a precondition to the exercise of the Board's jurisdiction to grant an order for interim relief pursuant to sections 98(1)(b) or (c). While the employer argues that there has been no exercise of rights by an employee such as would engage this section and that in any event its actions were appropriate and proper, I have reservations about whether the employer has offered a satisfactory explanation of the conduct alleged by the union. Given the view I take of this matter, however, and in view of the ongoing litigation with respect to the main applications it is not appropriate to address this issue further.

18. Pursuant to section 98(2), prior to granting interim relief pursuant to section 98(1)(b) or (c), the Board must determine, among other things, that the interim relief is "necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives". The burden of proof lies on the applicant.

19. The union's declarants assert that the employer's actions constitute a breach of the statutory freeze provisions. They assert that if the union can not compel the employer to comply with the law, then the employer will have conveyed the message to the employees that it can change their terms and conditions of employment at whim with no protection for the employees under the law and that the union is ineffectual. Further, the union's declarants assert that the employer's actions have conveyed the message that it will attempt to rid itself of actual or

potential union supporters which will have a chilling effect on the ability of the union to engage employees in the future.

20. The issue is whether the union has established that it will experience harm that is irreparable if interim relief is not granted. I am not persuaded that it has. This is not a case like the ones the Board has granted to date, where the corrosive effect of the improper discharge of a key union supporter from the workplace is such that it gives rise to irreparable harm. Since neither Ms. Vankerkhoven's lay-off nor her current continuing absence from the workplace are the product of any alleged improper conduct on the part of the employer, her situation cannot be analogized to those cases. Nor is the union at a particularly vulnerable point in its campaign to establish bargaining rights. The union is not actively soliciting support in the form of membership cards, and the union's success in its remedial certification application is not dependent on it doing so. Further, there is no impending representation vote. Indeed, if the Board were to order a vote pursuant to section 11(2)(b), rather than certify the union pursuant to section 11(2)(c), it is arguable that the remedies which the union seeks would be more effective if ordered shortly before that vote as part of the remedies in the main applications.

21. Accordingly, the application for interim relief is denied.

0356-07-R Darren Cates, Applicant v. The Carpenter's District Council of Ontario, United Brotherhood of Carpenter's and Joiners of America and its Local 494 and Carpenters Union, Central Ontario Regional Council and Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers and United Brotherhood of Carpenter's and Joiners of America; and the following Local Unions: 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222, and 2486, Responding Party v. **Walls.Com Inc.**, and 1690148 Ontario Inc., Intervenor

Bargaining Rights – Employer Initiation – Practice and Procedure – Termination – The employer argued that the trade union should be precluded from alleging a violation of s. 63(16) because it failed to particularize the impugned conduct in a timely way – The Board upheld the employer's position, stating that the union must engage in due diligence to articulate its position as promptly as possible, in accordance with the Board's Rules – This failure of due diligence (a delay of over three months) caused the Board to deny the union the opportunity to lead evidence relating to employer initiation – Matter continues

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Michelle Packer* and *Darren Cates* for the applicant; *Melissa Kronick, Tomi Hulkkonen, Chad Brockman* and *Tyson Rainone* for the responding party; *Bryce Chandler* and *Stephen Lestage* for the intervenor.

DECISION OF THE BOARD; November 30, 2007

1. This is an application to terminate bargaining rights filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "Act"). This proceeding came on for hearing before me on November 29, 2007. At that time, the intervenor raised a preliminary argument relating to whether the responding party should be

permitted by the Board to allege a violation of section 63(16) of the Act by the intervenor and to call evidence in support of that allegation. The parties thereupon argued the issue raised by the intervenor. At the completion of argument, I advised the parties that I would provide them with a decision on this preliminary issue no later than December 3, 2007. This is that decision, and the reasons for my decision.

2. There does not appear to be any dispute regarding the facts underlying the bringing of the preliminary motion by the intervenor. This proceeding was filed with the Board by the applicant on April 26, 2007. In its response filed with the Board on May 1, 2007, the responding party asserted that the application had been initiated, supported and encouraged by the intervenor, contrary to section 63(16) of the Act. No material facts were pleaded by the responding party in support of that assertion.

3. A representation vote was taken, the ballots cast were segregated, and the ballot box was sealed. In accordance with the Board's Information Bulletin No. 10, the parties filed submissions regarding the outstanding issues in dispute. In support of the section 63(16) allegation, the responding party asserted that two of the individuals in dispute withdrew their memberships with the Carpenters at the behest of one of the principals of the intervenor (and identified those individuals), and that the principals of the intervenor had assisted and been directly involved in the filing of this application and/or had provided financial support to the applicant to pay for counsel to file and pursue the application. No further information regarding these allegations was pleaded by the responding party.

4. On July 4, 2007, a panel of the Board (differently constituted) directed that the responding party provide the applicant and the intervenor with full particulars of its section 63(16) allegations within 10 days of the date of that decision, failing which "the union will be precluded from pursuing this allegation any further".

5. Full particulars of the section 63(16) allegations were not provided to the applicant or to the intervenor within the 10 days directed by the Board. In fact, no particulars were provided at all. A hearing on the merits [illegible]s scheduled by the Board for August 24, 2007. On August 17, 2007, counsel for the responding party wrote to the Board (copying other counsel) and indicated that her client had just become aware that same morning of certain information that supported the responding party's section 63(16) allegation. It was alleged in that correspondence that one of the principals of the intervenor had promised (and provided) an employee a raise for withdrawing his membership from the union, that two employees were told by the same principal that if they did not sign the petition they would not work, and that one of those same employees drove the same principal to two banks to withdraw money to give to the lawyer he had hired to represent the applicant in this proceeding, which the applicant could not otherwise afford. The responding party asked that it be entitled to rely on that information in addition to the information previously filed in support of its allegations with respect to section 63(16) of the Act.

6. Both the applicant and the intervenor wrote to the Board immediately after receiving the information from counsel for the responding party, objecting to the introduction of the new alleged facts. Both asserted that the allegations had not been made in a timely manner. Both also asserted that the responding party had not sufficiently particularized its allegations. The parties subsequently agreed to adjourn the hearing scheduled for August 24, 2007, and set new dates for hearing in November and December, 2007. When this proceeding came on for hearing on

November 29, 2007, this issue had not been resolved and accordingly I entertained the argument of counsel on same.

7. During the course of argument counsel for the intervenor indicated (and counsel for the responding party confirmed) that the two individuals in the bargaining unit who are the source of the particulars provided by the responding party on August 17, 2007 were members of the responding party in early May, 2007 and continue to be members. Counsel for the intervenor asserted that these two individuals could easily have been approached for information regarding these allegations in early May, 2007. I asked counsel for the responding party regarding the efforts made by her client to make contact with these individuals before her letter was filed with the Board in August, 2007. Counsel quite candidly acknowledged that she could not advise the Board that her client had made any effort to contact the two individuals regarding the allegations until shortly before her letter was filed with the Board in August.

8. Counsel for the intervenor (supported by counsel for the applicant) relied upon the decision of the Board in *Sirch Holdings Inc. (c.o.b. The Ridout Tavern Complex)*, [1997] OLRD No. 4078, application for judicial review dismissed by the Divisional Court (see *Sirch Holdings Inc.*, [2000] OLRB Rep. January/February 155 (February 23, 2000)). Counsel also referred me to a number of other Board decisions that had relied upon the *Sirch Holdings* decision (*First View Properties Inc. carrying on business as First View Homes*, [2002] CanLII No. 30874 (October 21, 2002); *Parrow v. United Food and Commercial Workers Union, Local 175 (August 5, 2003)*, [2003] CanLII No. 43002; and *N.S.E. 2000 Inc.*, [2000] CanLII 4074 (September 29, 2000)).

9. In *Sirch Holdings*, the employer in a termination proceeding objected to evidence being led regarding the alleged involvement of a supervisor in the initiation of the application. The basis for the objection was the same as that here – that the allegations were not made in a timely manner. In the alternative, it was asserted (as it is here) that the allegations were insufficiently particularized. The Board allowed the objection, and refused to entertain the evidence. It noted that the application had been delivered on September 16, 1997, that the vote had been held 10 days later, and that the Officer's Report of Vote advised the parties that they had until October 7, 1997 to make detailed representations regarding any matter related to the application. On October 7, 1997 an unsupported allegation of a violation of section 63(16) was raised by the union. Three days later more correspondence and a section 96 application was received by the union, but the allegations in that correspondence and the unfair labour practice complaint did not come close to providing a detailed statement of the material facts relied upon. The ruling in question occurred at the hearing of the matter on October 28, 1997.

10. The Board disagreed with the proposition raised by counsel for the union in that proceeding that there are no time limits for making allegations pursuant to section 63(16) of the Act. The Board made the following observations at paragraph 4 and 5 of its decision:

> 4. … There is a strong need to bring quick resolutions to both certification and termination applications and the events surrounding them. The Board's mechanisms are all geared to further that end.
>
> 5. In this case, the bulk of the union's allegations relate to the initiation of the termination application, so logically they relate to events that occurred prior to September 16, 1997. The union's failure to particularize allegations within approximately a month of their occurrence is a failure of due diligence.

> If allegations of a serious nature are to be entertained by the Board, they must be filed in compliance with the Board's rules and timeframes. Permitting the union to proceed in the circumstances would not be consistent with the Legislative goals and the Board's procedural requirements of bringing a speedy resolution to termination applications.

11. As noted above, an application for judicial review of this decision was subsequently dismissed by the Divisional Court. The Divisional Court concluded that the decision of the Board did not amount to a denial of natural justice. The Court noted that although the individual in question was named by the union in its letter to the Board, the identity of employees who he was alleged to have influenced was not provided, nor was the time, place and method of exerting that influence provided. The Court noted that particularization of the complaint was necessary in order to permit the employer to prepare to defend against it, and that in the "highly volatile" atmosphere that surrounds decertification applications the complaint needed to be made promptly. The Court concluded as follows:

> 16. In our view, the Union had more than ample opportunity to obtain and put in writing particulars in support of its allegations. Having not done so, and knowing full well its obligations to do so, the Union cannot say it should have been allowed to tender its evidence. There simply was no denial of natural justice.

12. The circumstances of this proceeding lead me to the same conclusion reached by the Board and the Divisional Court in *Sirch Holdings*. In that decision, the Board notes how important it is to particularize serious allegations against individuals in accordance with the time frames reflected by the Board's Rules. On one level, it is simply a matter of fairness as it relates to the individual who is said to have acted improperly. That individual must be given a fair opportunity to defend himself or herself against the allegations being made, and the mere passage of time makes it more difficult for the individual to do so. However, there are other reasons for requiring serious allegations to be pleaded quickly and fully. From a labour relations perspective, the Board wants to deal as quickly as possible with representation proceedings in order to minimize the disruption that inherently occurs when an application for certification or an application for termination of bargaining rights is filed with respect to a workplace. From an institutional perspective, to the extent possible the Board wants to eliminate adjournments and the inefficient use of resources that results from the late delivery of allegations of improper behaviour, such as occurred in this proceeding.

13. As noted by counsel for the intervenor, in *Sirch Holdings* the Board found that a delay of approximately one month between the making of the allegation and the delivery of certain material facts was a "failure of due diligence" on the part of the union. Here, the delay was three and one-half months, and there is really no explanation at all (reasonable or otherwise) for the delay. Just as importantly, the failure to furnish particulars arose in the context of a Board decision dated July 4, 2007 that required the responding party to file "full particulars" of its allegations within 10 days of that decision. Although I agree with counsel for the responding party that it ought not to be necessary for her client to "drag the individuals down to the union hall kicking and screaming" in order to question them regarding the allegations, the responding party must at least have made some effort to contact the individuals – particularly after having received a decision of the Board directing it to file particulars or to be faced with an inability to rely upon the assertion that section 63(16) had been violated. Here, the responding party cannot

even establish that it tried to contact anyone about the allegations. To adopt the same concept referred to by the Board in *Sirch Holdings*, the responding party here has failed to perform its "due diligence" on these allegations, resulting in a delay of three and one-half months before the intervenor and applicant were advised of the substance of the allegations against the intervenor. Rules 2.4 and 5.1 of the Board's Rules of Procedure have not been complied with. Although the Board has the authority pursuant to Rules 40.5 and 40.7 to relieve against the strict application of Rules 2.4 and 5.1, in my view it would not be appropriate to do so in the circumstances of this case.

14. As a result, the responding party will not be permitted to lead evidence relating to the allegation that the intervenor has violated section 63(16) of the Act.

15. This proceeding is scheduled to continue on December 14, 2007. Counsel agreed to discuss amongst themselves the outstanding procedural issues in an effort to resolve same before the hearing reconvenes. In the event that the parties cannot resolve those issues, one of the parties should contact the Registrar and arrange for a conference call to take place well before the hearing reconvenes.

16. I will remain seized of this proceeding.

1600-06-R; 3971-06-R International Union of Operating Engineers, Local 793, Applicant v. **William Day Construction Limited**, Responding Party

Certification – Practice and Procedure – Representation Vote – An application for certification was filed on August 22, 2006 – On March 15, 2007, the trade union accepted the employer's s. 8.1 challenge and, on the same date, filed a second application for certification – The employer argued that the second application should be barred pursuant to s. 111(3)(c) of the Act, s. 7(10) of the Act, or s. 111(2)(k) of the Act – In the alternative, the employer argued that the union should be precluded from challenging the inclusion of certain employees that had been included in the first application for certification and which had been agreed to on March 15, 2007 – The Board addressed each of the employer's arguments: (1) there is no basis to depart from the Board's usual practice of postponing consideration of a subsequent application until a final decision has been issued on the original application; (2) s. 7(10) does not apply since the application was not withdrawn; rather, the union accepted the employer's s. 8.1 objection, requiring the Board to dismiss the application under s. 8.1(5)7; and (3) the Board will generally only impose a bar when there have been successive unsuccessful applications or where the wishes of the employees have not been decisively tested in a representation vote – There had been no decisive testing or successive applications and the Board declined to exercise its discretion to dismiss the second application for certification – Finally, the Board held that voter eligibility must be determined on the date of the application for certification – Neither party is bound to lists of eligible voters by virtue of positions previously taken in a different application – First application dismissed – Second application continues

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Sean McFarling* and *Ken Lew* appeared on behalf of the applicant; *Kevin Eady* and *Darren Day* appeared on behalf of the responding party.

DECISION OF THE BOARD; November 23, 2007

1. Board File Nos. 1600-06-R and 3971-06-R are both applications for certification filed by the International Union of Operating Engineers, Local 793 ("the union") under the *Labour Relations Act, 1995,* S.O. 1995, c.1 as amended (the "Act"). Both applications are in respect of a unit of employees of the responding party, William Day Construction Limited ("the employer").

2. The application in Board File No. 1600-06-R was filed with the Board on August 22, 2006 (the "First Application"). By letter dated March 15, 2007, the applicant accepted the responding party's challenge under section 8.1 of the Act and agreed to the dismissal of the application under section 8.1(5)7 of the Act. That same day, on March 15, 2007, the applicant filed a fresh certification application in Board File No. 3971-06-R (the "Second Application").

3. The employer contends that both of these applications should be dismissed for any one of the following reasons:

> 1. The Board should exercise its discretion to refuse to entertain the Second Application under subsection 111(3)(c) of the Act, because at the time it was filed the First Application was still before the Board;
>
> 2. In the alternative, the Board should find that the First Application was withdrawn by letter dated March 15, 2007 and accordingly that the Second Application is barred as a consequence of the provisions of subsection 7(10) of the Act;
>
> 3. In the further alternative, the Board should impose a discretionary bar under subsection 111(2)(k) of the Act to prevent the Second Application from proceeding in view of the union's conduct in these applications which the responding party describes as an abuse of process.

In the event that the Board does not accept that the Second Application should be dismissed for any of the above reasons, the employer argues that the union should be precluded from challenging 22 individuals whom the union in effect accepted as being included in the bargaining unit in the First Application.

4. This decision addresses these preliminary issues.

Factual Background

5. As noted above, the First Application was filed with the Board on August 22, 2006, whereas the Second Application was filed with the Board on March 15, 2007, approximately seven months later. A representation vote was held in both applications.

6. In the First Application, the union filed membership evidence on behalf of 52 individuals and asserted that there were 52 individuals in its proposed bargaining unit. The responding party took the position that a larger bargaining unit was appropriate. The responding

party also raised an objection under section 8.1 of the Act and contended that there were in fact 149 individuals in the appropriate bargaining unit. There were therefore a large number of status disputes in that application.

7. A representation vote was held in the First Application on August 29, 2006 and the ballot box was sealed having regard to the employer's objection under section 8.1 of the Act. A Regional Certification Meeting was held in Sudbury on September 20, 2006, which was adjourned to be continued on October 27, 2006. That meeting was subsequently rescheduled to November 17, 2006. On or about October 30, 2006, the responding party provided the union with documentation concerning the individuals whose status was in dispute in the First Application. The Regional Certification Meeting was then adjourned to December 6, 2006. However, on December 1, 2006, the parties requested that the application be adjourned *sine die*.

8. By decision dated December 5, 2006, the Board adjourned the First Application for a period of three months having regard to the agreement of the parties. Three days prior to the expiry of that three month period, the union wrote to the Board asking that the matter be scheduled for hearing.

9. On March 15, 2007, which the employer points out was between six and seven months after the filing of the First Application, the Second Application was delivered to the responding party. Later that same day, counsel for the responding party received a copy of a letter addressed to the Board, the content of which reads as follows:

> Please be advised that the Applicant, after extensive investigation and review of material provided by the Responding Party, accepts and agrees with the Responding Party's challenge pursuant to section 8.1 of the *Labour Relations Act, 1995*. The Applicant further accepts and agrees, for the purposes of this application and without prejudice to any position the Applicant may take in any other or future proceeding, with the Responding Party's proposed bargaining unit description and acknowledges that it did not have sufficient membership support in its application for certification. The parties, therefore, have reached agreement on the bargaining unit description in this case and the section 8.1 challenge brought by the Responding Party.
>
> Accordingly, the Applicant requests that based on the agreements of the parties, the Board dismiss the Application for Certification in OLRB File No. 1600-06-R on the basis that the Applicant had membership evidence on behalf of less than 40% of the individuals in the bargaining unit and that the Board direct that the ballots be destroyed without being counted in accordance with paragraph 7 of subsection 8.1(5) of the Act.
>
> We trust this to be satisfactory. If you have any questions or concerns, please do not hesitate to contact the undersigned directly.

10. The next day, the union wrote to the Board by letter dated March 16, 2007 requesting that the Second Application be processed in the normal course in view of the anticipated dismissal of the First Application. On March 18, 2007, the responding party filed its response to the Second Application, in which it asserted that there were 219 individuals in both the union's proposed bargaining unit and in its proposed bargaining unit. The difference between the parties

concerning the appropriate bargaining unit relates to whether the unit should be described by reference to the responding party's "Levack Operations" in a particular geographic area or whether it should refer only to that geographic area. A Regional Certification Meeting was held on April 18, 2007 in the Second Application and the hearing in that application was originally set for May 29, 2007 but was adjourned on consent.

11. The hearing held on September 25, 2007 was the first day of hearing in both applications. The responding party contends that 22 of the 96 individuals whose status is in dispute in the Second Application must have been accepted by the union as being employees in the bargaining unit in the First Application. In this regard, the employer refers to the fact that the union must be taken to have accepted that those 22 individuals were employed in the bargaining unit in the First Application when the union conceded on March 15, 2007 that it did not have membership evidence on behalf of forty percent of the employees in the bargaining unit. The responding party therefore argues that, even if the Board rejects its other preliminary arguments to the effect that the Second Application should be dismissed outright, the union should, at a minimum, be precluded from disputing the status of those 22 individuals in the Second Application.

12. The Board will address below the employer's preliminary arguments in the order in which they were argued.

Should the Board refuse to entertain the Second Application?

13. The employer submits that the Board should exercise its discretion pursuant to subsection 111(3)(c) of the Act to refuse to entertain the Second Application. Section 111(3) of the Act gives the Board discretion regarding how to deal with a subsequent certification application filed by a trade union where a final decision has not yet been issued in an earlier certification application. That provision reads as follows:

> (3) Despite sections 7 and 63, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for the certification or for the declaration is made with respect to any of the employees affected by the original application, the Board may,
>
> (a) treat the subsequent application as having been made on the date of the making of the original application;
>
> (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
>
> (c) refuse to entertain the subsequent application.

In the present case, neither party suggested that it would be appropriate to treat the Second Application as having been filed on the same day as the First Application pursuant to subsection

111(3)(a) of the Act, given that it was filed approximately seven months after the First Application. The parties differ on whether the Board should exercise its discretion to postpone consideration of the Second Application until the First Application has been disposed of as contemplated under subsection 111(3)(b) of the Act or whether the Board should refuse to entertain the Second Application as contemplated under subsection 111(3)(c) of the Act.

14. The employer argues that it is not appropriate to simply postpone consideration of the Second Application for a number of reasons, including the conduct of the union in the First Application. The employer contends that the First Application was never a proper application and the union is now seeking to start the whole process over again some seven months after that application was filed. In this regard, the employer notes that the union never filed any post-vote submissions in the First Application and now seeks to raise the same status disputes in the context of the Second Application. The responding party suggests that there should be a period of repose, which is not possible given the way that these applications have been structured. The employer presumably refers in this regard to the fact that the Second Application was filed immediately prior to the applicant sending a letter to the Board that same day accepting the employer's challenge under section 8.1 of the Act in the First Application.

15. The Board is not however persuaded that there is any basis in the present case to depart from its usual practice in similar circumstances of applying the provisions of subsection 111(3)(b) to postpone consideration of the subsequent application until a final decision has been issued in the original application. This practice is referred to in *A.D.M. Agri-Industries Limited, A-Lert Inc., Mike Piper c.o.b. as Advance Pipeline & Mechanical Contractors, 882870 Ontario Inc. operating as Advance Pipeline & Mechanical Contractors,* [1994] O.L.R.D. No. 4326 (November 28, 1994). In that case, the Board accepted that it should postpone consideration of a second certification application filed by the same trade union in respect of the same unit of employees of the responding party until a final decision issued in the first application. In that case, like the present one, the second application was filed several months after the first application and was filed when the first application was still pending before the Board. This approach of postponing consideration of the second application contemplated under subsection 111(3)(b) of the Act has also been followed more recently in *Fernbrook Homes Ltd.*, [2006] O.L.R.D. No. 279 (January 23, 2006). In that case, like the present one, a prior application filed by the same applicant was still outstanding at the time the second application was filed.

16. In the Board's view, the fact that there was a hiatus of some seven months between the filing of the two applications, rather than four months as was the case in *A.D.M. Agri-Industries Limited,* cited above, and that little effort was made to proceed with the First Application does not in all the circumstances warrant a departure from this practice. While the applicant in the present case waited some seven months after filing the First Application before accepting the responding party's challenge under section 8.1 of the Act and did not significantly advance the litigation of the outstanding issues in that application, both parties agreed to the various adjournments that led to this period of relative inactivity.

17. In all the circumstances, the Board declines to exercise its discretion under subsection 111(3)(c) of the Act to refuse to entertain the Second Application. The Board instead finds it appropriate to postpone consideration of the Second Application until a final decision issues in the First Application.

Should the Final Decision in the First Application reflect a withdrawal of the Application?

18. The responding party contends, in the alternative, that the First Application should be considered as having been withdrawn by the union on March 15, 2007 such that the Second Application is barred having regard to the provisions of subsection 7(10) of the Act. That provision reads as follows:

> **7.** (10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is withdrawn.

This section provides a mandatory bar where an application for certification is withdrawn after a representation vote is taken. In the responding party's submission, the statutory bar under subsection 7(10) of the Act would run from the date of the Board's determination accepting the union's withdrawal of the First Application.

19. In support of its argument, the employer relies on the decision in *Sarah Lee Bakery Canada,* [1996] OLRB Rep. May/June 480 and in *K.J. Beamish Construction Co., Ltd.,* 2007 CanLII 22570 (ON L.R.B.) (June 15, 2007). The employer relies on the discussion therein regarding the fact that representation votes in certification applications and the statutory freeze that follows the filing of a certification application affect the workplace and that a period of repose offered by a bar is appropriate to address the resulting prejudice caused to the employer and the employees. The employer points out that in the present case there were two representation votes held some seven months apart requiring employees to cast a ballot twice and that the workplace has been unsettled by the pending applications for a lengthy period of time. Neither decision however involves circumstances in which the Board has construed an acceptance of an objection under section 8.1 of the Act as a withdrawal.

20. The Board must address whether the applicant's letter of March 15, 2007 is properly construed as a withdrawal of the First Application. In the Board's view, it should not. The letter itself makes abundantly clear that the applicant seeks to accept the responding party's outstanding objection under section 8.1 of the Act and to accept the dismissal of the application under section 8.1(5)7 of the Act. Subsection 8.1(5)7 reads as follows:

> **8.1** (1) If the employer disagrees with the trade union's estimate, included in the application for certification, of the number of individuals in the unit, the employer may give the Board a notice that it disagrees with that estimate.
>
> . . .
>
> (5) The following apply if the Board receives a notice under subsection (1):
>
> . . .
>
> 6. After the Board's determination of the number of individuals in the unit under paragraph 4 or 5, the Board shall determine

> the percentage of the individuals in the bargaining unit who appear to be members of the union at the time the application for certification was filed, based upon the Board's determination under paragraph 4 or 5 and the information provided under subsection 7(13).
>
> 7. If the percentage determined under paragraph 6 is less than 40 per cent, the Board shall dismiss the application for certification and, if the ballot boxes were sealed, the Board shall direct that the ballots be destroyed without being counted.

What the applicant acknowledges is that the percentage of the individuals in the bargaining unit who appear to be members of the union at the time the application was filed is less than 40 per cent. Nowhere in the letter to the Board dated March 15, 2007 does the applicant express an intention to withdraw its application.

21. Generally speaking, a party is entitled to accept the position advanced by the other party at any time. In *Hussmann Canada Inc.*, [2005] O.L.R.D. No. 2443 (June 16, 2005), the Board explained its approach to a concession by the applicant to the validity of a notice under section 8.1 of the Act, as follows:

> 22. To deal with the first matter, an applicant trade union may, at any time, concede the validity of a notice given by an employer under section 8.1. That is, it can agree that the disputes about who is on the list of employees are properly resolved by accepting the position taken by the employer, and that therefore the notice under section 8.1 is valid. That is, union [sic] may agree on the list of employees submitted by the employer, and acknowledge that it has submitted membership evidence on behalf of fewer than forty percent of the persons in the bargaining unit. The Board's approach to this type of fact situation is clear and consistent. An applicant trade union may do so at any time. It makes no sense to require a party to litigate a matter that is not in dispute. The reasoning in *Martha's Gardens Inc.*, [1977] OLRB Rep. Sept. 891, does not apply in this circumstance, as the notice under section 8.1 is something only the employer may file. It is thus not open to the applicant to adopt the Employer's notice. That is, the issue may not be kept alive if the parties adopt each other's positions. Thus, once the applicant accepts the responding party's list as accurate, the Board will find that the notice under section 8.1 is determinative of the application and it will be dismissed under section 8.1(5), paragraph 7.
>
> ...
>
> 28. Parties may concede the other's side's position for a variety of reasons. Sometimes they are based on a genuine conclusion that the other side is right, sometimes the reasons are purely strategic. So long as no party is engaged in an abuse of process, that is, using the Board's process for ends that are totally divorced from the purpose behind the application that was filed, they are entitled to do so. ...

> 29. … The opportunity [to concede the Employer's position under section 8.1] was available because of a previous strategic decision made by the Employer. There was nothing wrong in taking it.

In the present case, the responding party's objection under section 8.1 of the Act in the First Application remained outstanding at the time the applicant wrote to the Board on March 15, 2007. It was therefore open to the applicant to accept that position.

22. In the Board's view, the fact that the applicant did not accept the employer's position immediately after receiving the response does not lead to the conclusion that "the letter as framed is simply an attempt to disguise the withdrawal" to avoid the consequences of subsection 7(10) of the Act. As noted by the Board in *Supply Chain Management Inc.*, [2000] OLRB Rep. March/April 397 (March 27, 2000) at paragraph 4 in a similar context, it is not surprising that "parties engaged in litigation do not necessarily accept the conclusions offered by one another, particularly at an early stage in the process." The fact that the applicant in the present case waited until after it had an opportunity to review the documents provided by the employer in support of its position before accepting that position does not imply that the applicant's acceptance of the section 8.1 objection was simply a disguised withdrawal.

23. The situation in the present case is similar to that before the Board in *Supply Chain Management Inc.*, cited above (reconsideration request dismissed in *Supply Chain Management Inc.*, [2000] OLRB Rep. May/June 560 (June 21, 2000)). In that case, the Board rejected the responding party's contention that a letter submitted by counsel for the union to the Board, in which he had also specifically referred to his client's consent to the application being dismissed in accordance with of subsection 8.1(5)7 of the Act, constituted a withdrawal of the application. Similarly, in the present case, the applicant by letter dated March 15, 2007 accepted the responding party's outstanding objection under section 8.1 and the dismissal of that application under subsection 8.1(5)7 of the Act. The fact that it did so on the same day it filed the Second Application is irrelevant. The consequence of its decision is that the First Application will be dismissed under section 8.1(5)7 of the Act. Pursuant to section 10(4) of the Act, the bar contemplated under subsection 10(3) of the Act in circumstances where an application for certification is dismissed following a representation vote is not applicable with respect to a dismissal under subsection 8.1(5)7 of the Act.

24. For all these reasons, the Board is unable to find that the applicant withdrew the First Application by letter to the Board dated March 15, 2007 such that subsection 7(10) of the Act operates as a bar to the Second Application.

Should the Board impose a discretionary bar because of an abuse of process?

25. The employer's contention that a discretionary bar should in any event be imposed under subsection 111(2)(k) of the Act remains to be considered. That provision reads as follows:

> **111.** (1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.
>
> (2) Without limiting the generality of subsection (1), the Board has power,
>
> …

> (k) to bar an unsuccessful applicant for any period not exceeding one year from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding one year from the date of the dismissal of the unsuccessful application;

26. In *R.J.R. MacDonald Inc.*, [1992] OLRB Rep. April 503, the Board discussed the circumstances in which it will generally exercise its discretion to impose a bar under subsection 105(2)(i) of the Act (now s. 111(2)(k), under which the maximum period has increased from ten to twelve months). The Board explained its practice and the rationale for it, as follows:

> 14. Section 105(2)(i) envisages the possibility of a temporary bar to the exercise of these statutory rights where an applicant has been unsuccessful and the Board, in its discretion, considers such bar to be appropriate. However, the Board has not normally exercised its discretion to impose a bar unless the employees have had the opportunity to express their wishes in a Board-supervised representation vote, or there have been several unsuccessful applications in rapid succession. (See generally: Repac Construction and Material Limited, [1978] OLRB Rep. Jan. 91; Sonora Cosmetics Inc., [1982] OLRB Rep. June 954; Amarcord Carpenters Ltd., [1989] OLRB Rep. June 531; Southern Express Lines of Ontario Ltd., [1988] OLRB Rep. Oct. 1107; and Mor-Alise Construction Ltd., [1977] OLRB Rep. Oct. 668.)
>
> 15. Section 105(2)(j) requires the Board to balance the rights of employees to form or join a trade union and the interests of employers (or objectors) to have that matter settle as simply and expeditiously as possible. That is why the Board will almost always impose a bar after a decisive testing of employee wishes in a secret ballot vote, or if there has been a series of unsuccessful applications which have been cumulatively disruptive. In either case, orderly labour relations demands a period of repose. But the Board has been careful not to use its discretion under section 105(2)(j) to unduly circumscribe employee rights or "punish" an unsuccessful applicant – especially when such applicant will seldom have complete information about an employer's organization, and no means of acquiring that information apart from the application itself. In that context, it is difficult to ascribe "fault" for the way in which a proceeding develops – even though the employer will inevitably be put to some inconvenience responding to its employees' efforts to organize themselves. In the instant case, for example, some expense and delay are attributable to the bargaining unit dispute which was ultimately resolved in the union's favour, but it would be wrong to ascribe "fault" to any of the parties for pursuing this question.

The Board will therefore generally only impose a bar where there have been successive unsuccessful applications or where the wishes of the employees have been decisively tested in a representation vote. In the circumstances of *R.J.R. MacDonald Inc*, cited above, the Board refused to impose a bar notwithstanding that the union sought to withdraw the application after having put the objecting employees and the employer to some inconvenience and cost in litigating the bargaining unit question.

27. The employer submits that the jurisprudence suggests that an abuse of process may be found such as to warrant the imposition of a bar on future applications where there are repeated certification applications brought by the same applicant in a short period of time or where an application is filed for the purpose of obtaining the employee list in order to assist with future organizing (*D.J. Venasse Construction Limited,* [1990] OLRB Rep. April 419; *Extendicare Diagnostic Services,* [1981] OLRB Rep. August 1134). While the employer acknowledges that there have not been repeated applications in this case, it argues that the result of the two applications filed in the present case some seven months apart is that it has been subject to a statutory freeze for a considerable period of time. The employer submits that the Board's decision in *K. J. Beamish Construction Co., Ltd.,* 2007 CanLII 22570 (ON L.R.B.) and in *K. J. Beamish Construction Services Ltd.,* 2007 CanLII 852 (ON L.R.B.) (January 17, 2007), wherein a discretionary bar was imposed, suggest that an employer and its employees should not be subject to the statutory freeze for a prolonged period of time.

28. The employer also argues that the fact that the applicant has basically accepted its proposed bargaining unit in the First Application when the applicant filed the Second Application represents an admission that the First Application was inappropriate. The employer further contends that the fact that the applicant asserted in the First Application that it had filed cards on behalf of 52 individuals in a bargaining unit of 52 individuals is not believable. The employer submits that what this shows is that the First Application was not a genuine application, but rather was simply an attempt to learn the reality of the situation by seeing what the employer would file in response. Further, the employer notes that an abuse of process should be inferred from the fact that the applicant made no effort to drive that proceeding forward in the period from December 5, 2006 to March 15, 2007 and that it was simply taking the employer's list and organizing the employees in the intervening period. The employer argues that the seven month delay up to March 15, 2007 and the thirteen month delay up to the first day of hearing reflects the applicant's abuse of the Board's processes.

29. In the present case, there has neither been a decisive testing of the employees' wishes through a representation vote, nor has there been successive applications filed by the applicant. The situation in the present case is also significantly different than that in *K. J. Beamish Construction Services Ltd.,* cited above, in which the employer and the employees were theoretically subject to a statutory freeze for a period of 8 or 9 years. In that case, the Board imposed a six month discretionary bar under subsection 111(2)(k) of the Act following its finding that the applicant had abandoned a certification application filed in 1998 in respect of employees of the responding party but had not proceeded with it for years thereafter. The subsequent application filed by the same applicant some eight years later in 2006 was accordingly dismissed. In determining to impose a discretionary bar, the Board had regard to the fact that the applicant had kept the bargaining unit of construction labourers in limbo for a period of in excess of 8 years, during which time the statutory freeze was theoretically in effect, and that this raised a concern about prejudice to the employees.

30. The situation in the present case is by no means comparable given that the First Application had only been filed some seven months prior to the Second Application. In addition, while the employer in the present case complains about the inactivity of the applicant in pursuing the application in the period between December 5, 2006 and March 15, 2007, the employer cannot now complain that the bargaining unit was left in limbo for some thirteen months when the employer agreed to the adjournments resulting in the delay.

31. The situation in the present case is also substantially different from that before the Board in *K.J. Beamish Construction Co., Ltd.*, cited above, in which, the Board imposed a discretionary bar under subsection 7(9) of the Act following the applicant's withdrawal of its certification application filed under section 128.1 of the Act. Prior to the withdrawal, the parties had litigated a number of status disputes over a number of days of hearing during which the Board heard from approximately 20 witnesses. The Board then issued a decision with respect to those status disputes on November 2, 2006, the result of which was that the Board would be ordering a representation vote of employees in the bargaining unit given its finding that the applicant had membership support of between 40% and 55% (and not over 55% required to obtain certification without a vote). Rather than face a representation vote, the applicant decided to withdraw its application and at the same time filed a fresh certification application. In the circumstances, the Board found that it was not fair to the employer to have to start the process all over again after having successfully resisted some of the union's positions. The Board accordingly exercised its discretion under subsection 7(9) of the Act to impose a bar where the trade union withdrew its application rather than face a representation vote.

32. The present case is distinguishable in that there has been no litigation at all of the positions taken by the parties in the First Application and therefore the cost and inconvenience to the employer and the employees associated with the First Application is substantially less. The applicant has not further sought to withdraw its application rather than face a representation vote. Instead, the applicant determined to accept the responding party's position concerning the extent of its membership support and sought a dismissal of that application under section 8.1 of the Act. As noted by the Board in *Supply Chain Management Inc.*, cited above at para 8, "[a] dismissal without a bar is the norm prescribed by section 8.1 of the Act and is therefore the approach most consistent with the process envisioned by the Act." The Board's approach to a dismissal under section 8.1 is not applicable to its approach to a withdrawal under section 128.1 of the Act (*K.J. Beamish Construction Co., Ltd.*, cited above, at para 27).

33. The situation in the present case is therefore similar to that before the Board in *Supply Chain Management Inc.*, cited above. In those cases, the Board accepted the applicant's request that its certification application be dismissed under subsection 8.1(5)7 of the Act without the imposition of a bar. In the present case, the Board is similarly not persuaded that the circumstances warrant the exercise its discretion under subsection 111(2)(k) to impose a bar on the basis of one attempt at certification, in which the applicant concluded that it had underestimated its membership support relative to the size of the bargaining unit.

34. The fact that the union did not immediately accept the section 8.1 objection upon seeing the response but rather waited until after it had an opportunity to review the documents provided by the employer in support of its position does not lead the Board to conclude that the First Application was not genuine. The Board is also not persuaded that it should infer an abuse of its process from the fact that the applicant proposed in the Second Application a substantially similar bargaining unit to that proposed by the employer in the First Application or from the fact that the applicant claimed in the First Application that it had membership support on behalf of all 52 employees it believed to be its proposed bargaining unit. Section 8.1 of the Act specifically contemplates that a trade union may inaccurately estimate the size of the bargaining unit when it applies for certification and prescribes that no bar will be imposed in circumstances where it has under-estimated the size of the bargaining unit (*Custom Aluminum Inc.*, [2004] O.L.R.D. No. 2044). Where the responding party has given notice under section 8.1 of the Act, which has not

been withdrawn at the time that the trade union accepts the challenge, the trade union is entitled to accept that position without incurring a bar. Its decision to accept the challenge is not an abuse of the Board's processes.

35. For all these reasons, the Board declines to exercise its discretion under subsection 111(2)(k) of the Act to impose any other bar.

Should the applicant be precluded from challenging the status of 22 individuals?

36. The employer contends that the applicant should, in any event, be precluded from challenging in the Second Application the status of 22 individuals whose eligibility it purported to accept in the First Application. The employer's position is that the applicant is precluded from asserting a list that differs from the list of 149 employees put forward by the employer in the First Application because the union accepted the section 8.1 objection as valid. Ironically, the employer does not suggest that it is also bound to that list in that it now seeks to assert in the Second Application that there are 219 employees eligible to vote in that application.

37. Even accepting the employer's contention that the applicant should be taken to have accepted the underlying facts supporting the employer's challenge under section 8.1 of the Act when it accepted that the application should be dismissed under that section, the underlying facts supporting the objection in the First Application do not speak to the eligibility of individuals to vote in a certification application filed some seven months later. The eligibility of an individual to vote in these certification applications is determined by reference to whether that individual had an employment relationship with the responding party in the voting constituency on the certification application filing date. As such, the fact that the applicant may have accepted that certain individuals were eligible to vote in one application does not represent an acknowledgement that they were also employed in the bargaining unit some seven months later when the Second Application was filed.

38. The situation in the present case further differs from that before the Board in *Park Lane Nursing Home Limited,* [1981] OLRB Rep. July 945 relied upon by the employer. The issue in that case concerned whether the applicant should be bound to its agreement in an earlier proceeding that certain classifications of employees, "charge" R.N.A.'s, are persons who exercise managerial functions. In that case, the Board found it appropriate to hold the applicant to its agreement made a few short months earlier in a different proceeding that persons employed in that classification are persons who exercise managerial functions. In doing so, the Board noted that it was not contended in the later proceeding that the duties and responsibilities of individuals employed in that classification had changed since that time.

39. In the present case, the applicant accepted that it did not have sufficient membership support in its application for certification. The applicant further asserted that at least three cards filed with the application were filed on behalf of individuals whose names do not appear on the employer's list such that it need not be taken to have acknowledged that any of the 22 individuals referred to by the employer were in the bargaining unit when it conceded that it did not have 40% support. In either event, any acknowledgement that certain individuals were in the bargaining unit in the First Application does not speak to the employment status of those individuals some seven months later when the Second Application was filed.

40. In the circumstances, the Board finds that neither party is bound to any list of eligible voters by virtue of the positions they took in the First Application.

Disposition

41. For all these reasons, the Board therefore dismisses the application for certification in Board File No. 1600-06-R pursuant to subsection 8.1(5)7 of the Act. Pursuant to section 10(4) of the Act, no bar is imposed.

42. The Registrar will destroy the ballots cast in the representation vote taken in Board File No. 1600-06-R following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

43. The application in Board File No. 3971-06-R is referred to the Registrar to process in the normal course.

COURT PROCEEDINGS

(2558-03-JD) (Court File No. 522/06) International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Applicant v. Comstock Canada Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 and the OLRB and Bruce Power LP, Respondents

Jurisdictional Dispute – Judicial Review – Natural Justice – The Iron Workers claimed that Comstock wrongly assigned I-beam installation work to members of the UA – The Iron Workers referred to approximately 20 civil drawings in their reply submissions in order to demonstrate that the work in question belonged to it – The Board decided that it could not determine what weight ought to be given to the drawings – The Board found that the work in dispute was properly assigned to the UA – On judicial review, the Iron Workers argued that the Board had violated natural justice and procedural fairness by failing to consider the drawings – The Court found that the Board had considered the drawings but did not find them helpful to the resolution of the issue in its first decision; the Iron Workers had failed to raise the issue of the drawings in their request for reconsideration – Application for judicial review was dismissed

Superior Court of Justice (Divisional Court), Gans, Swinton and Nordheimer JJ, November 22, 2007

SWINTON J.: (Orally)

[1] The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (the "Iron Workers") seeks judicial review of two decisions of the Ontario Labour Relations Board: the decision made on August 4, 2006 upholding an assignment of work

to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 ("UA") and the decision made on September 14, 2006, refusing to reconsider the earlier decision.

[2] The Iron Workers brought a complaint to the Board pursuant to s.99 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, after the respondent Comstock Canada Ltd. assigned the installation of certain I-beams to the UA. After a consultation, the Board held that the disputed work was properly assigned by Comstock to the UA.

[3] Central to the applicant's position in this application for judicial review is the argument that the Board violated the rules of natural justice or procedural fairness by failing to consider some twenty drawings that were sent to it along with the applicant's reply submissions in April, 2005.

[4] In paragraph 32 of its reasons, the Board appears to address the drawings included with the reply submissions, although we note there was no discussion about those drawings in those submissions. Paragraph 32 reads:

> Thus I am not able in this dispute, as I was with other area practice, to assess whether the work depicted in a drawing (which I assume are all civil drawings) is similar to the work in dispute. Many of them may have been constructed, for example, in the early days of construction at the Bruce, or may have included supports for other trades other than the UA. I cannot determine, as I have with the material filed, what weight, if any, ought to be given to these assignments.

We are satisfied that the Board considered the drawings, and it appears that the Vice Chair did not find them helpful to the resolution of the issue before him.

[5] Even if we were to accept that the Vice Chair did not consider these drawings, the argument based on procedural fairness fails because of the applicant's failure to avert to these drawings in its reply submissions or in its submissions in its request for reconsideration in September, 2005. The significance of the failure to address these drawings specifically is underscored by the fact that one of the central thrusts of the reconsideration submissions was the Board's failure to consider and appreciate relevant evidence (see page 9899 of the Record of Proceedings). This failure tends to belie the argument now made that these drawings were of material significance.

[6] The standard of review of a decision of the Board interpreting and applying s.99 of the *Act* is patent unreasonableness. The Vice Chair gave thorough and clear reasons for his decision, applying the factors that the Board normally considers in jurisdictional disputes and finding that the particular work in dispute did not serve a structural function. His decision was eminently reasonable and demonstrates the labour relations expertise to which deference must be given by this Court.

[7] Therefore, the application for judicial review is dismissed.

GANS J.

[8] I have endorsed the Record accordingly, "For oral reasons read this day by Swinton J., the application is dismissed. Costs are agreed at $7,500, for each of the Respondent UA and Comstock, inclusive of GST and disbursements, payable within 30 days. None of the remaining Respondents seeking indemnification as to costs."

1702-04-R et al (Court File No. 32171) Greater Essex County District School Board, Applicant v. International Brotherhood of Electrical Workers, Local 773, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, International Union of Bricklayers and Allied Craftworkers, Local 6, The International Union of Painters and Allied Trades, Local 1494, and Labourers' International Union of North America, Local 625 and OLRB, Respondents

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

Superior Court of Canada, Coram: Bastarache, Abella and Charron JJ., November 15, 2007

The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M34720, dated May 23, 2007, is dismissed with costs to the respondent Unions.

1271-03-U; 1336-03-M; 1414-03-M (Court File No. C-46210) Mississaugas of Scugog Island First Nation, Applicant v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444, Great Blue Heron Gaming Company and Attorney General of Ontario, Attorney General of Canada and OLRB Respondents

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – On a ministerial reference regarding the appointment of a conciliator, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – On judicial review, the Divisional Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the appellant had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the Court held that the Board had the statutory authority to conduct the proceedings as it did – The application for judicial review was dismissed – On appeal, the Court of Appeal noted that – (1) there was still no evidence of an aboriginal practice, custom or tradition that supports the right to enact a distinct Code – (2) such a practice would not be integral to the

distinctive culture of the appellant – (3) there was no reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim – The decisions of the Board and Divisional Court were correct – Considering the Crown's duty to consult and accommodate the aboriginal claim, the Court found that meaningful consultation could not have taken place because the appellant had not made known its claim during the unionization drive and certification proceedings – The Court also found that the appellant, rather than the Crown, had taken peremptory and unilateral action which initiated the dispute – The Crown did not breach its duty to consult and accommodate – Appeal dismissed

Court of Appeal for Ontario, Sharpe, Gillese and Blair JJ.A., November 27 , 2007.

[1] This appeal involves a claim to rights of aboriginal self-government. The issue is whether the appellant Mississaugas of Scugog Island First Nation has the legal right to enact its own code of labour law to govern collective bargaining in relation to a commercial undertaking that operates on reserve lands.

[2] The Great Blue Heron Casino (the "Casino") operates on the small reserve belonging to and occupied by the appellant. Approximately one thousand employees work at the Casino, less than one percent of whom are members of the appellant First Nation. A few months after the Ontario Labour Relations Board ("OLRB") certified the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("CAW") as the Casino employees' bargaining agent under the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), the appellant's Band Council enacted its own *Labour Relations Code* (the "*Code*"). The appellant's *Code* is closely modelled on the *Canada Labour Code*, R.S.C. 1985, c. L-2 with certain significant exceptions. The appellant asserts that it has the right to enact the *Code* and displace the *LRA* under its aboriginal and treaty rights, as recognized and affirmed by s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] The OLRB rejected those claims and found that there was no ancestral practice, custom or tradition capable of supporting the right, properly characterized as the right to regulate labour relations on the reserve. The OLRB also found that no treaty right was established that would lead to any right to regulate labour relations or, more broadly, a right to self-government. The OLRB concluded that the *LRA* applied to the Casino and its employees. The Divisional Court dismissed the appellant's application for judicial review.

[4] The appellant was given leave to appeal to this court. For the reasons that follow. I would dismiss the appeal.

FACTS

[5] The appellant is a registered Indian Band under the *Indian Act*, R.S.C. 1985, c. I-5. The appellant Band belongs to the Mississauga tribe or nation, a branch of the Ojibway, and its members identify themselves as part of the Anishnaabeg. The appellant occupies a small reserve near Port Perry, Ontario. There are 173 registered Band members, forty of whom live on the reserve.

[6] The Casino, owned by the appellant and operated by the Great Blue Heron Gaming Company (the "GBHGC"), a multinational conglomerate, is a Las Vegas style gaming facility with over fifty table games (black jack, roulette, poker etc.) and 450 slot machines. GBHGC operates the day-to-day business of the Casino.

[7] The Band receives substantial revenues from the Casino which employs approximately one thousand workers (less than one per cent of whom are Band members) and operates seven days a week, twenty-four hours a day. The Casino is the only commercial enterprise operating on the reserve.

[8] The Casino opened in 1996 and CAW began its efforts to organize the workers shortly thereafter. Casino workers voted to unionize, and in December 2002, CAW applied for certification under the *LRA*. Although the appellant had publicly opposed unionization, it did not intervene in the *LRA* certification proceedings nor did it make known its intention to enact its own *Code*. The OLRB certified the CAW under the *LRA* as the workers' bargaining agent in January 2003. CAW served GBHGC with a notice to bargain although bargaining could not commence until May 29, 2003 when the union was registered under the *Gaming Control Act, 1992*, S.O. 1992, c. 24.

[9] The appellant enacted its own *Code* on June 6, 2003. The *Code* was passed at an informal Band meeting of the Band Chief and two Band Councillors. There was no public notice of the meeting and no minutes were kept. The appellant did not notify the OLRB, the GBHGC, the CAW or either the federal or provincial governments of its intention to enact the *Code*.

[10] The appellant's *Code* is a comprehensive modern-day labour relations code, closely modelled on the *Canada Labour Code*, but displaying some significant differences: strikes and lockouts are banned; a union must pay a fee of $3000 and obtain permission from the Dbaaknigewin, the labour relations tribunal established by the *Code*, to speak to workers on the reserve; and workers must pay a fee of $12,000 to file an unfair labour practice complaint.

[11] When GBHGC refused to meet CAW to bargain in the face of the appellant's *Code*, CAW asked the Minister of Labour to appoint a conciliation officer pursuant to s. 18 of the *LRA*. GBHGC objected to that request, alleging that it was unclear whether or not the *LRA* applied. The appellant informed the Minister of its position that the *LRA* did not apply and that the Casino's labour relations were governed by the *Code*. CAW then filed an unfair labour practice complaint with the OLRB alleging that the employer was not bargaining in good faith. The Minister referred the issue of whether the Minister had the authority to appoint a conciliation officer to the OLRB, pursuant to s. 115 of the *LRA*. CAW sought an expedited hearing on the ground that it risked decertification if no collective agreement was in place by the first anniversary of certification and a conciliation officer was not appointed. The appellant intervened before the OLRB and served notices of constitutional questions on the Attorneys General of Canada and Ontario. The OLRB held that it had jurisdiction and would hear the constitutional question and proceeded to hear it.

[12] The appellant's evidence of ancestral customs, practices and traditions focused on ancestral customs and practices of decision-making relating to "work-related activities" and "territorial access". The OLRB rejected the appellant's contention that this evidence was capable

of supporting the enactment of the appellant's *Code* as the exercise of an aboriginal or treaty right.

[13] The Divisional Court dismissed an application for judicial review, essentially adopting the reasoning and analysis of the OLRB.

ISSUES

[14] The order granting leave to appeal identified three issues. As the parties did not treat issues 1 and 3 as distinct issues, I will consider them together.

1. Did the Divisional Court err in too narrowly characterizing the aboriginal and treaty rights claimed by the First Nation?

2. Did the Divisional Court err in not finding that the OLRB had failed to consider the Crown's duty to consult and to accommodate regarding the aboriginal and treaty rights claimed by the First Nation?

3. Did the Divisional Court err in failing to consider the rights claimed by the First Nation to be an intrinsic aspect of an aboriginal treaty right?

ANALYSIS

[15] The *Constitution Act, 1982*, s. 35 recognizes and affirms existing aboriginal and treaty rights of aboriginal peoples. Existing aboriginal rights include common law rights that recognize and give legal effect to the inherent right of aboriginal peoples to maintain the distinctive traditional and customary practices of pre-contact aboriginal societies that are not inconsistent with Crown sovereignty or basic common law principles and do not strain Canada's constitutional structure. Treaty rights are consensual in nature and arise from agreements reached between the Crown and aboriginal peoples.

[16] While the jurisprudence of aboriginal and treaty rights is well-developed, relatively few cases deal with claims to aboriginal rights of self-government. Before turning to that body of case law, I note that there is an established legal framework that determines the application of provincial laws of general application to aboriginal persons and aboriginal lands. Pursuant to the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(24) and the *Indian Act*, s. 88, provincial laws of general application apply *ex proprio vigore* to aboriginal persons, provided they do not touch on the "core of Indianness" and provided they do not violate an existing aboriginal or treaty right protected by the *Constitution Act, 1982*, s. 35. It has been held that provincial labour laws apply to activities conducted on aboriginal lands: *Four B Manufacturing Ltd. v. United Garment Workers of America*, 1979 CanLII 11 (S.C.C.), [1980] 1 S.C.R. 1031; *Saskatchewan Indian Gaming Authority v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (CAW-Canada) (2000), 73 C.L.R.B.R. (2d) 65 (Q.B.), aff'd (2000), 73 C.L.R.B.R. (2d) 94 (C.A.). Accordingly, unless the appellant can make out its claim that it has an aboriginal or treaty right to enact its own labour law regime, the *LRA* applies to the reserve, the Casino, the GBHGC and the CAW.

Issues 1 and 3

Did the Divisional Court err in too narrowly characterizing the aboriginal and treaty rights claimed by the First Nation?

Did the Divisional Court err in failing to consider the rights claimed by the First Nation to be an intrinsic aspect of an aboriginal treaty right?

I Aboriginal Rights

[17] The Supreme Court of Canada has held that, to the extent that there exists an aboriginal right to self-government, the applicable legal standard is that laid down in *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507 [*Van der Peet*] for the determination of other activities related to aboriginal rights: see *R. v. Pamajewon*, 1996 CanLII 161 (S.C.C.), [1996] 2 S.C.R. 821 [*Pamajewon*] at paras. 24-25.

[18] In determining whether there is an aboriginal right using the *Van der Peet* test, the first step is to characterize the right claimed. The right must be characterized in context and with sufficient specificity to allow the court "to identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community": *R. v. Sappier, R. v. Gray*, 2006 SCC 54 (CanLII), [2006] 2 S.C.R. 686 [*Sappier*] at paras. 22, 24. The right claimed should not be framed in excessively general terms or artificially broadened or narrowed or otherwise distorted to fit the desired result: *Mitchell v. M.N.R.*, 2001 SCC 33 (CanLII), [2001] 1 S.C.R. 911 [*Mitchell*] at paras. 15, 20; *Pamajewon* at para. 27; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para. 170.

[19] Three factors shape the characterization of the right claimed: (i) the nature of the action that is claimed to have been carried out pursuant to an aboriginal right; (ii) the nature of the government regulation, statute or action being impugned; and (iii) the practice, custom or tradition relied upon to establish the right: *Van der Peet* at para 53.

[20] Once the claimed right is characterized, it is for the claimant to establish that an aboriginal right exists.

[21] The following elements must be proved: (i) the existence of an aboriginal practice, custom or tradition that supports the right; (ii) that this practice, custom or tradition was integral to the distinctive culture of the claimant group's pre-contact society; and (iii) reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim: *Van der Peet* at paras. 53-59, 64-65; *Mitchell* at para. 12.

[22] The appellant submits that *Delgamuukw*, which deals with aboriginal title, modifies the *Van der Peet* test, as applied in *Pamajewon*, with respect to activity-related claims such as claims to rights of self-government. I disagree. *Delgamuukw* distinguishes *Van der Peet*, but only in relation to claims to aboriginal title:

> The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first

> contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land. Para. 142.

[23] This passage has no bearing on the application of the *Van der Peet* test to the activity-related claim of a right to self-government. This is clear from *Delgamuukw* itself where Lamer C.J. explicitly refers to *Pamajewon* as governing claims to self-government (at para. 170) and indicates that at the new trial being ordered, any claim to self-government must be determined in accordance with *Pamajewon*.

[24] Accordingly, I will now proceed to apply the *Van der Peet* test to the facts of this case.

(a) Characterization of the right

[25] The appellant's suggested characterization of the right claimed is the right to regulate work activities and to control access to aboriginal lands. For the following reasons, I agree with the OLRB and the Divisional Court that this characterization cannot be accepted and that the correct characterization is the right to regulate labour relations on aboriginal lands.

[26] Three factors in this case must be considered in accordance with the *Van der Peet* test when characterizing the claimed aboriginal right: (i) the enactment of the *Code*; (ii) the nature of the *LRA* with which it conflicts; and (iii) the ancestral practice, custom or tradition upon which the appellant relies.

[27] First, when one looks to the *Code*, it is apparent that its subject is labour relations, not the regulation of work activities or controlling access to aboriginal lands. It is common ground that the *Code* is essentially modelled on the *Canada Labour Code*. The *Code* establishes a detailed regulatory framework to govern labour relations and to resolve disputes arising between employers and workers in relation to the collective bargaining process. Neither the *Canada Labour Code* nor the appellant's *Code* regulate work activities: under both regimes, that is left for negotiation and contract between the union and the workers pursuant to the collective bargaining process.

[28] Nor can the *Code* fairly be characterized as controlling access to aboriginal lands. The sole provision relating to access to aboriginal lands, s. 50, only deals with access where any person wants "to enter on to the Reserve for the purposes of soliciting or seeking to solicit employees to join a union". The essential character of this provision of the *Code* is plainly the same as that of the *Code* as a whole: it deals with the regulation of labour relations and collective bargaining. To the extent that it deals with access to reserve lands, it does so in a purely incidental fashion. It would, with respect, be a gross distortion to characterize the *Code* as regulating access to reserve lands on the basis of a single provision that regulates access to reserve lands *only* where the party entering the land does so to solicit union members.

[29] Second, the provisions of the *LRA* with which the claim conflicts have nothing to do with access to the reserve or with the regulation of work activities. The *LRA*, like the *Code*, is a modern labour code to regulate the regime of collective bargaining. Sections 17, 18, 70 and 96 of the *LRA* were identified before the OLRB as being in conflict with the *Code*. All of these provisions address the regulation of collective bargaining: s. 17 deals with the obligation to bargain; s. 18 deals with the appointment of conciliation officers; s. 70 deals with interference by

employers; and s. 96 deals with the appointment of a labour relations officer to investigate a complaint. All of these conflicting provisions point to the regulation of labour relations as the true character of the *Code*.

[30] Third, as I will explain below, the appellant is unable to identify any ancestral practice, custom or tradition that bears any relationship to a modern labour relations code.

[31] Finally, the Supreme Court rejected a virtually identical characterization of the claimed right in *Pamajewon* at para. 27:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the courts to do so.

[32] The appellant has failed to persuade me that this statement does not apply to the characterization it offers.

[33] I conclude, accordingly, that the OLRB and the Divisional Court did not err in characterizing the right claimed as the right to enact a labour relations code that applies to aboriginal lands.

(b) Proof of the aboriginal right

[34] In my view, the appellant fails to satisfy any of the three elements required to support an aboriginal right to enact a labour relations code that applies to aboriginal lands.

[35] First, there is no evidence of an aboriginal practice, custom or tradition that supports the right to enact a labour relations code. This element was explained in *Sappier* at para. 22:

> The goal for the courts is…to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claim right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection. [Emphasis in original.]

[36] The appellant's only witness as to aboriginal custom and practice was Professor Mark Walters. His affidavit and cross-examination indicate that the hallmarks of pre-contact Ojibway society were its family or clan base, its non-hierarchical structure and its consensual and non-adversarial dispute resolution process. These defining features are fundamentally at odds with the appellant's *Code* which is market-based, is hierarchical in structure and establishes an adversarial dispute resolution processes before the Dbaaknigewin, a quasi-judicial board that has no demonstrated connection with aboriginal tradition and exercises coercive powers.

[37] Before this court, it was common ground that the appellant's only evidence as to an aboriginal practice, custom or tradition is to be found in para. 19 of the Walters affidavit. Given its importance to the resolution of this appeal, I set out that paragraph in full:

> The chiefs and elders of each extended family unit, or local clan segment, within an Anishinaabe village met in council to decide upon the issues that confronted the community. In the absence of coercive state institutions, negotiation and consensus between these family or clan leaders was the only method of coordinating social and political action, or of settling disputes. At these councils decisions were made about which families would use which planting fields, or fisheries, or hunting areas, or trade routes at any given time. Family rights of access to the band's fisheries and hunting territories may have been re-allocated annually, or in some cases more permanent resource rights may have been acknowledged. In general, the village councils were intimately involved in the organization of work-related activities within the village – including the organization of planting and hunting, and preparation of festivals and ceremonial or recreational gatherings. The village council would also decide upon whether to grant permission to members of other clan-villages, or other nations, to travel through or hunt or fish within their territories. Through the reciprocal exchange of gifts, which often had more spiritual than material value, agreements were reached permitting one clan-village to enter and/or use another band's territory or trade routes.

[38] I entirely agree with and adopt the OLRB's conclusion on this aspect of the case:

> The evidence also established conclusively, that the regulation and management of labour relations as we understand that term, was in no way part of the traditional culture or practices of the First Nation. There can be no doubt that there were no employees or employers and certainly no groups or organizations analogous to trade unions that purported to represent the interests of either employers or employees within the society. There was no labour market, nor anything resembling a wage-labour relationship where labour would be sold in exchange for some form of compensation. There is no evidence at all to suggest that the First Nation had a traditional practice whereby a decision making council (like the Dbaaknigewin) dealt in a hierarchical and coercive (terms used in the evidence) way with the regulation of relationships between what we might think of as employers, employees and groups of employees.
>
> Even if one were to recast the notion of "labour relations" at a much higher level of generality, there is nothing in the evidence and information provided by the First Nation to suggest that there was a practice of

> organized relationships delineating responsibilities and obligations as between those who would perform labour, and those who would have labour performed. Moreover, (and this goes to the second branch of the test) it can certainly not be said that any such relationships formed an integral or defining part of First Nation's society.
>
> It would be difficult on any rational understanding of the evidence before the Board to conclude that the first branch of the test has been met. There is no basis for concluding that there is an ancestral practice, custom or tradition which could support the claimed right - that being the regulation of labour relations on the territory of the First Nation. Paras. 79-81.

[39] Second, even if we were to accept the appellant's characterization of the right as an aboriginal practice to regulate work activities and access to aboriginal lands, such a practice could not be said to be integral to the distinctive culture of the appellant. In *Van der Peet,* at para. 56, the Supreme Court rejected "aspects of the aboriginal society that are true of every human society (e.g., eating to survive)" as practices capable of supporting an aboriginal right and insisted that the focus be "on the aspects of the aboriginal society that make that society distinctive". The evidence led as to the traditional regulation of work activity bears no relation to modern collective bargaining. The appellant cannot escape this deficiency by relying on the fact that the aboriginal society organized the work activities of its members: the organization of work at that level of generality is a feature of every human society.

[40] Third, the appellants have failed to establish reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim. While aboriginal rights are rooted in the past, they are not frozen, but are capable of evolving into modern form provided there is continuity linking the present exercise of the aboriginal claim to the distinctive character and nature of the right in its original form.

[41] The appellant's *Code*, however, exhibits no meaningful relationship or connection with pre-contact communal, non-hierarchical practices of decision-making in relation to the organization of work activities and access to territory, inspired by values of family, clan and connection to the land. The *Code* is market-based, adversarial and inspired by the *Canada Labour Code*. Its roots are entirely post-contact and derived from modern law dealing with contractual relationships between employers and employees in a post-industrialist capitalist economy. No process or community-wide consultation based on aboriginal custom or tradition was followed when the *Code* was enacted. The *Code*, in the words of *Van der Peet*, at para. 73, "arose solely as a response to European influences" and therefore does "not meet the standard for recognition of an aboriginal right."

(c) Other sources

[42] The appellant relies on the *First Nations Lands Management Act*, S.C. 1999, c. 24, ss. 18 and 20, conferring on First Nations certain powers in relation to the ownership, management and use of First Nations lands. I see no merit in the submission that the specific powers conferred by this Act in relation to ownership, management and use of First Nations lands can somehow be converted into a plenary power to legislate in relation to all manner of activities that take place on First Nations lands. As stated in its preamble, the Act implements an agreement between the

Crown and certain First Nations "in relation to the management by those first nations of their lands". There is nothing in the Act that could be read as adopting a general right of aboriginal self-government.

[43] The appellant also referred us to a federal policy document published under the authority of the Minister of Indian Affairs and Northern Development, the *Federal Policy Guide: Aboriginal Self Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995). It reflects Canada's recognition of the inherent right of self-government under the *Constitution Act, 1982*, s. 35. The *Policy* was adopted in view of the failed efforts to amend the Constitution to include a right of aboriginal self-government and aims to make litigation "a last resort" by implementing self-government through specific "practical and workable agreements". When describing the areas in which the federal government indicates its willingness to negotiate self-government agreements, "labour/training" is identified as going "beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group" where "laws and regulations tend to have impacts that go beyond individual communities". The Policy specifies that in these areas, "primary law-making authority would remain with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws." I fail to see how this policy document, aimed at implementing self-government through specific issue-by-issue agreements, assists the appellant in making out a right to self-government under existing law, especially in an area that is identified as being inappropriate for a future agreement that would confer plenary powers.

[44] The appellant also relies on the Ontario *Statement of Political Relationship,* a 1991 agreement between the Government of Ontario and the Ontario Chiefs-in-Assembly, explicitly recognizing "the inherent right to self-government of the First Nations…under the Constitution of Canada". It is clear, however, from s. 5, that both sides regarded the Statement as being a political commitment that did not alter or prejudice existing legal rights:

> This Statement of Political Relationship expresses the political commitment of the First Nations and Ontario and is not intended to be a treaty or to create, redefine or prejudice rights or affect obligations of the First Nations or Ontario, or the aboriginal or non-aboriginal peoples in Ontario.

[45] In my view, this political agreement neither adds nor subtracts from existing legal and constitutional rights and therefore does not assist the appellant in this case.

[46] Finally, the appellant referred us to the *United Nations Draft Declaration on the Rights of Indigenous People (1993/4)* (since adopted by the United Nations General Assembly). This convention, which Canada voted against and has not ratified, recognizes the right of indigenous peoples to "self-determination", to govern their own lands and to have their own distinct political, legal, economic, social and cultural institutions. While international law often is of assistance in the interpretation of domestic legal and constitutional norms, the general language of the *Draft Declaration* does not, in my view, provide any meaningful assistance to the resolution of the specific issue of Canadian constitutional law presented here.

(d) Aboriginal rights: conclusion

[47] In the final analysis, the appellant's claim is cast at a level of such generality that it amounts to an assertion that First Nations should be accorded a virtually unconstrained right of self-government in relation to any activity that takes place on aboriginal lands. That submission

is at odds with the governing jurisprudence, in particular, the decision of the Supreme Court in *Pamajewon*.

[48] Accordingly, I see no basis upon which to interfere with the decisions of the OLRB and the Divisional Court that the appellant failed to make out its claim that it has an aboriginal right to enact the *Code* to govern labour relations on reserve lands.

II Treaty Rights

[49] The appellant also relies on treaty rights in support of its claim. The appellant asserts treaty rights under the Covenant Chain relationship, confirmed by the Treaty of Niagara of 1764. Neither the Covenant Chain nor the Treaty of Niagara is the subject of a specific instrument or agreement. The Covenant Chain, in the words of the appellant's expert, Prof. Walters, consists of various "oral engagements and rituals at 'council fires' that were modeled upon Aboriginal legal forms and customs" and came "to embrace an entire set of constitutional assumptions about the relationship between the Crown and Indian nations". The Covenant Chain "secured peace, friendship, and military alliance between the parties; it also provided a 'council fire' at which issues of common concern could be discussed and resolved". Professor Walters describes the records of the Treaty of Niagara as being "relatively brief" and consisting of "speeches… given in the style and tradition of Covenant Chain protocol". The OLRB characterized the Covenant Chain, at para. 90, as "a set of documents and corresponding related historical events…[that] illustrates the development of the relationship between First Nations parties and European powers."

[50] For the purposes of this appeal, I do not find it necessary to delve into the history of the Covenant Chain and the Treaty of Niagara or to determine their precise legal nature and status. Put at its highest, the appellant's treaty claim, like its aboriginal rights claim, is general in nature and amounts to this: the aboriginal people were promised that they could live as they had lived before contact and that their customs and customary law would be protected. There is no evidence arising from the records and conversations that comprise the Covenant Chain and the Treaty of Niagara of any specific term or promise that goes beyond a general understanding that, in the words of Prof. Walters, "provided the foundational terms for the Crown's claims to sovereignty over Canada – and those terms were understood by native and non-native delegates alike to include the right of self-determination within native communities and lands."

[51] I agree with and adopt the OLRB's assessment of the treaty claim, at paras. 92-93:

> It is undisputed that the Covenant Chain does not touch in any way upon the organization of the performance of labour. Rather, the First Nation argues that the Covenant Chain continues the aboriginal right of self-government that predated first European contact and has, since then, not been surrendered.
>
> The practices which are protected under the Covenant Chain, according to the First Nation, are cast at the same level of generality as those asserted as inherent rights. It is clear even from the evidence relied upon by the First Nation that rights which might have been continued from this 'treaty' have nothing to do with and do not speak in any way to the regulation of activity as between employers and employees.

[52] The Covenant Chain and the Treaty of Niagara, at best, reflect the general nature of the relationship between the Crown and First Nations at the time and confirm the basic common law doctrine of inherent aboriginal rights. As with the argument based upon inherent aboriginal rights, to accept the treaty argument would be to accept an aboriginal right of self-government on reserve lands of virtually unlimited breath and amplitude and exceeding anything seen to date in the jurisprudence of aboriginal treaty rights. Accordingly, I see no reason to disturb the judgment of the Divisional Court refusing to grant judicial review of the order of the OLBR.

III. Justification

[53] As I would not interfere with the finding that the appellant failed to make out an aboriginal or treaty right to enact a labour relations code to apply to activities on aboriginal lands, it is unnecessary to decide whether the Crown has justified the *LRA* as a legitimate limitation on such a right.

Issue 2

Did the Divisional Court err in not finding that the OLRB had failed to consider the Crown's duty to consult and to accommodate regarding the aboriginal and treaty rights claimed by the First Nation?

[54] The appellant contends that the Crown breached its duty to consult and accommodate the aboriginal claim. This argument, based upon the decision of the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511 [*Haida Nation*], was not advanced before the OLRB as *Haida Nation* had not been decided, but it was argued before the Divisional Court.

[55] *Haida Nation* holds, at para. 35, that the duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". The scope of the duty is, at para. 39, "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed". Where the claim is weak, the duty of the Crown may be limited to giving notice of its intended action, disclosing information and discussing issues raised in response to the notice. Where there is a strong case for the claim, the opportunity to make submissions, formal participation in the decision-making process and provision of written reasons may be required. There is no fixed or mandatory standard that applies to every case, and it is open to the Crown "to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases": para. 44. The court added, at para. 45, "The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."

[56] The appellant submits that the Crown breached its duty to consult and accommodate when the Minister of Labour referred to the OLRB the question of whether the *LRA* or the appellant's *Code* applied to collective bargaining between GBHGC and its employees. I am unable to accept this submission for the following reasons.

[57] *Haida Nation* establishes that three elements are required: (i) a credible claim for aboriginal right or title, whether or not established; (ii) actual or constructive government knowledge; and (iii) conduct that would infringe or interfere with the claimed right. In my view, none of these elements is made out.

[58] First, for reasons I have already explained, it is my view that the aboriginal claim asserted by the appellants was dubious from the start and therefore not sufficiently credible to call for consultation. In any event, as I will explain further below, given the nature of the claim, it was reasonable in the circumstances for the government to refer the claim to the OLRB for resolution.

[59] Second, the first time the government knew or ought to have known of the claim was when the appellant enacted its *Code*. The appellants failed to make known any claim or right during the unionization drive and certification proceedings. The government was faced with the appellant's peremptory act late in the day and after the CAW and the GBHGC were fully engaged in the process mandated by *LRA*. It is not clear to me what meaningful consultation could have taken place by the time the government had knowledge of the claim.

[60] This is closely related to the third element and the need for conduct that would infringe or interfere with the claimed right. Ontario enacted the *LRA* more than fifty years ago, before the province knew or ought to have known of the existence of any claimed aboriginal right. In *Haida Nation*, it was the government that proposed to take some action that could interfere with or violate aboriginal rights. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 S.C.R. 388, another duty to consult case, the action triggering the duty was described at para. 49 as "unilateral Crown action". Where the government knows or ought to know that its proposed action will have an effect on a claimed aboriginal right, it is precluded from blindly proceeding without first consulting with the First Nation community whose rights are or might be affected. Here, however, it was the appellant, not the Crown, that took peremptory and unilateral action that initiated the dispute or conflict implicating a claim of aboriginal rights.

[61] Finally, if I am wrong and a duty to consult did arise, the scope of any duty was minimal. The duty to consult does not preclude the Crown from disputing an aboriginal claim that is asserted by a First Nation and litigating its existence before an impartial tribunal. In the circumstances of this case, faced with the urgent need to resolve the dispute between GBHGC and CAW, the Crown acted appropriately in referring the matter to the OLRB: the OLRB is an impartial decision-maker with expertise in the area of dispute and the process gave the appellant a full opportunity to present its case. Moreover, the appellant did participate in the OLRB proceedings, but did not refer to the duty to consult until after the OLRB decided the case against the appellant.

[62] Accordingly, I reject the appellant's submission that the Crown is in breach of its duty to consult and accommodate.

CONCLUSION

[63] For these reasons, I would dismiss the appeal and award the respondent CAW costs in the agreed amount of $15,000 inclusive of disbursements and GST.

0784-06-ES (Court File No. 152/07) 1257707 Ontario Limited o/a **Oakville Honda,** Applicant v. Creyos Batchelor and OLRB Respondents

Judicial Review – Employment Standards – The Board found that the employee was not guilty of wilful misconduct, disobedience or wilful neglect of duty – After a change of supervisors which brought about a change in company policy, the employee believed he still could sell used, non-warranty catalytic converters for his own benefit – The Board found his discharge was caused by a misunderstanding, granted the employee's appeal, and ordered the employer to pay termination pay – On judicial review the Court found the Board was entitled to come to the conclusion on the evidence – Application dismissed

Superior Court of Justice (Divisional Court), Carnwath, Pierce, Hackland JJ., December 3, 2007.

[1] The application will be dismissed. The evidence before the Board on the sale of used parts differed as to what the practice was before the arrival of Mr. Geofroy, the new parts manager.

[2] There was evidence from Mr. Batchelor and the former parts manager that the practice was to permit an employee to keep the proceeds from a parts sale. The Board accepted this evidence to support its finding there was a misunderstanding. The Board was entitled to come to this conclusion on the evidence before it.

[3] The Board further found that the other grounds of discharge, even if true, did not amount to wilfulness misconduct, disobedience or neglect of duty. Again the Board was entitled to so conclude on the evidence.

[4] I have endorsed the Application Record: "Costs to the Respondent Batchelor fixed at $3,000, inclusive of fees, disbursements and GST. Partial indemnity, payable 30 days. The Ontario Labour Relations Board does not seek costs."

0840-05-U (Court File No. 71/07) Stéphane Verreault v. Ontario Labour Relations Board, Teamsters Local Union 419, United Association of Journeypersons and Apprentices of the Plumbing and Pipefitting Industry of the US and Canada (787)

Duty of Fair Representation – Judicial Review – Leave to Appeal Refused

Court of Appeal for Ontario, Blair, Juriansz, LaForme J.A., December 5, 2007

Leave to appeal refused. Costs to each respondent fixed at $500.00

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 2007

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

4017-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1129365 Ontario Inc. o/a Richmond Homes (Respondent)

Unit: "all painters and painters' apprentices in the employ of 1129365 Ontario Inc. o/a Richmond Homes in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of 1129365 Ontario Inc. o/a Richmond Homes in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) *(Clarity Note)*

0098-07-R: Labourers' International Union of North America, Local 527 (Applicant) v. Lemmo Masonry Inc. (Respondent)

Unit: "all construction labourers in the employ of Lemmo Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Lemmo Masonry Inc. in all sectors of the construction industry in The City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0388-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Aecon Constructors, A Division of Aecon Construction Group Inc. (Respondent)

Unit: "all construction labourers in the employ of Aecon Constructors, A Division of Aecon Construction Group Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (30 employees in unit)

1955-07-R: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Zoltan Kerestely c.o.b. as Perfect Painting and Renovations (Respondent)

Unit: "all painters and painters' apprentices in the employ of Zoltan Kerestely c.o.b. as Perfect Painting and Renovations in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Zoltan Kerestley c.o.b. as Perfect Painting and Renovations in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1958-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A & M Apartments Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of A & M Apartments Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of A & M Apartments Ltd. in all sectors of the construction industry in he Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2070-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Denhall Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Denhall Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Denhall Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2078-07-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. A.R.T. Concrete Forming Ltd. (Respondent)

Unit: "all construction labourers in the employ of A.R.T. Concrete Forming Ltd. in all sectors of the construction industry in The County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2128-07-R: Plumbers Residential Council, Ontario (Applicant) v. Lunardo Plumbing Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Lunardo Plumbing Inc. in all sectors of the construction industry, save and except the industrial, commercial and institutional sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2154-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lonip Aluminum Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Lonip Aluminum Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Lonip Aluminum Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2186-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Steelcase Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Steelcase Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Steelcase Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2197-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction (Respondent)

Unit: "all construction labourers in the employ of Ekum-Sekum Incorporated o/a Brantco Construction in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

2200-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyor in the employ of Ekum-Sekum Incorporated o/a Brantco Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Ekum-Sekum Incorporated o/a Brantco Construction in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

2218-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Signature Store Fixtures Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Signature Store Fixtures Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Signature Store Fixtures Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2219-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lappo Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Lappo Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Lappo Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2307-07-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Julio Cicciarelli c.o.b. as Alba Plumbing & Heating (Respondent)

Unit: "all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Julio Cicciarelli c.o.b. as Alba Plumbing & Heating in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Julio Cicciarelli c.o.b. as Alba Plumbing & Heating in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2310-07-R: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. United Interior Construction Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of United Interior Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of United Interior Construction Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Clarity Note)*

2363-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Citywide Demolilton & Excavation Ltd. (Respondent)

Unit: "all construction labourers in the employ of Citywide Demolition & Excavating Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Citywide Demolition & Excavating Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

Bargaining Agents Certified Subsequent to Vote

3468-06-R: Labourers' International Union of North America, Local 506 (Applicant) v. C & A Tedesco Waterproofing Inc. (Respondent) v. Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local Union 598 (Intervener)

Unit: "all construction labourers in the employ of C & A Tedesco Waterproofing Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of C & A Tedesco Waterproofing Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

0044-07-R: Brick and Allied Craft Union of Canada (Applicant) v. 1214592 Ontario Limited o/a Colonial Building Restoration (Respondent) v. Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Union Local 598 (Intervener)

Unit: "all masonry restoration employees of 1214592 Ontario Limited o/a Colonial Building Restoration in the industrial, commercial and institutional sector of the construction industry in The City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

0089-07-R: Brick and Allied Craft Union of Canada (Applicant) v. Gibson Restoration Inc. (Respondent) v. Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Union Local 598 (Intervener)

Unit: "all masonry restoration employees of Gibson Restoration Inc. in the industrial, commercial and institutional sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

0091-07-R: Brick and Allied Craft Union of Canada (Applicant) v. 1214592 Ontario Limited o/a Colonial Building Restoration (Respondent) v. Operative Plasterers', Cement Masons', Restoration Steeplejacks' International Association of the United States and Canada, Union Local 598 (Intervener)

Unit: "all masonry restoration employees of 1214592 Ontario Limited o/a Colonial Building Restoration in the industrial, commercial and institutional sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

0120-07-R: Brick and Allied Craft Union of Canada (Applicant) v. 1214592 Ontario Limited o/a Colonial Building Restoration (Respondent) v. Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Union Local 598 (Intervener)

Unit: "all masonry restoration employees of 1214592 Ontario Limited o/a Colonial Building Restoration in the industrial, commercial and institutional sector of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

0125-07-R: Brick and Allied Craft Union of Canada (Applicant) v. Gibson Restoration Inc. (Respondent) v. Operative Plasterers', Cement Masons', Restoration Steeplejacks International Association of the United States and Canada Union Local 598 (Intervener)

Unit: "all masonry restoration employees of Gibson Restoration Inc. in the industrial, commercial and institutional sector of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

1293-07-R: Ontario Public Service Employees Union (Applicant) v. Dufferin-Peel Catholic District School Board (Respondent)

Unit: "all employees employed by the Dufferin-Peel Catholic District School Board in the Adult and Continuing Education Department of the English As A Second Language Program in the Regional Municipalities of Peel and Dufferin, save and except Supervisors, and persons above the rank of Supervisors, and persons covered by subsisting Collective Agreements" (57 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29

Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	4

1838-07-R: Service Employees International Union, Local 1.on (Applicant) v. Dom Lipa Slovenian Senior Citizens Centre (Respondent)

Unit: "all employees of Slovenian Linden Foundation employed at Dom Lipa in the City of Toronto save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff and students employed during the school vacation period" (70 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	72
Number of persons who cast ballots	65
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	21
Number of ballots segregated and not counted	5

1855-07-R: Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. Grant Home Hardware Building Centre (Respondent)

Unit: "all employees of Grant Home Hardware Building Centre in the City of Temiskaming Shores, save and except Managers, Store Manager and Office Staff" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	1

1884-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Oakley Sub Assembly Windsor, ULC (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all employees of Oakley Sub Assembly Windsor, ULC in the county of Essex, save and except supervisors, those above the rank of supervisor, office and sales staff" (44 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	3

1885-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. TRW Canada Limited (Respondent)

Unit: "all employees of TRW Canada Limited in the City of Windsor, save and except supervisors, those above the rank of supervisor, office staff, material planners, engineers, engineering change control staff and quality liaison staff" (185 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	211
Number of persons who cast ballots	197
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	136
Number of segregated ballots cast by persons whose names do not appear on voters' list	16
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	182
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	7

1888-07-R: The Canadian Union of Public Employees (Applicant) v. The Richmond Hill Public Library (Respondent)

Unit: "all employees employed by The Richmond Hill Public Library in the Town of Richmond Hill, save and except managers and persons above the rank of manager, Accounts Payable Assistants, Administration Communications Assistants, Administration Reception/Secretary, Administration Support Assistants, Administration Virtual Services Librarian, Administrative Assistants to the CEO, Branch Services Librarian, Circulation Coordinators, Executive Assistants to the CEO, Systems Specialists, and Sunday Supervisors" (110 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	117
Number of persons who cast ballots	97
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	85
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	41
Number of ballots segregated and not counted	12

1915-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. 618024 Ontario Inc., c.o.b as Canadian Electrical Services (Respondent)

Unit: "all employees of 618024 Ontario Inc., c.o.b. as Canadian Electrical Services in the Town of Markham, save and except foreman and persons above the rank of foremen, office, clerical and sales staff" (31 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	1

1936-07-R: Ontario Nurses' Association (Applicant) v. The WenLeigh Long-Term Care Community (Respondent)

Unit: "all Registered Nurses and Nurses with temporary Certificate of Registration employed by The WenLeigh Long-Term Care Community at 2065 Leanne Blvd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, Clinical Nurse Manager and Infection Control Practitioner/Quality Assurance Manager" (13 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	2

1937-07-R: UNITE HERE (Applicant) v. The Niagara Parks Commission (Respondent)

Unit: "all student employees of The Niagara Parks Commission, employed as servers in restaurants in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, executive chef, office and clerical staff and employees in units for which any trade union held bargaining rights as of July 5, 1994" (32 employees in unit) *(Having regard to the agreement of the parties.)*

1970-07-R: Amalgamated Transit Union, Local 685 (Applicant) v. Operation Lift Inc. (Respondent)

Unit: "all employees of Operation Lift Inc, working in and out of the City of Brantford, save and except the Eligibility Officer, supervisors, and persons above the rank of supervisor" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

1976-07-R: Ontario Public Service Employees Union (Applicant) v. Western Area Youth Services Inc. (Respondent)

Unit: "all employees of Western Area Youth Services Inc. in the Counties of Middlesex, Lambton, and Chatham Kent, save and except supervisors and persons above the rank of supervisor" (204 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	200
Number of persons who cast ballots	142
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	139
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	98
Number of ballots marked against applicant	41
Number of ballots segregated and not counted	3

1978-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers") (Applicant) v. VitalAire Canada Inc. (Respondent)

Unit #1: "all employees of VitalAire Canada Inc. in the City of Greater Sudbury, save and except supervisor and those above the rank of supervisor, respiratory therapist, and office and sales staff" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

1981-07-R: International Brotherhood of Electrical Workers, Local 1802 (Applicant) v. Electek Power Services Inc. (Respondent)

Unit: "all electrical technicians and technologists employed by Electek Power Services Inc. working in the Sarnia and the Lambton County geographic areas" (2 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2028-07-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local B173 (Applicant) v. Hamilton Entertainment and Convention Facilities Inc. (Respondent)

Unit: "all information clerks or information desk clerks employed at Hamilton Place and Hamilton Convention Centre in the City of Hamilton, Ontario, save and except Operations/Events Delivery, Co-ordinator, persons above the rank of Operations/Events Delivery, Co-ordinator and persons covered by subsisting collective agreements" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2040-07-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 2087676 Ontario Limited and, 1082955 Ontario Limited (Respondents)

Unit: "all employees of 2087676 Ontario Limited and 1082955 Ontario Limited in the Town of Ajax, Ontario, save and except Supervisors, persons above the rank of Supervisor, Accountants and Executive Chef" (54 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	8

2048-07-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Chubb Security Systems (A Division of CSG Security Inc.) (Respondent)

Unit: "all part-time employees of Chubb Security Systems (A Division of CSG Security Inc.) regularly employed not more than twenty-four hours per week at the security monitoring centre in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and technical employees, and persons already covered by existing collective agreements" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2055-07-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. A.L.C. Manufacturing Inc. (Respondent)

Unit: "all employees of A.L.C. Manufacturing Inc., carrying on business at 81 Akron Road, in the City of Etobicoke, save and except foreman, those above the rank of foreman, office, clerical, and sales staff" (56 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	4

2185-07-R: The Canadian Union of Public Employees (Applicant) v. Family and Children Services of St. Thomas and Elgin County (Respondent)

Unit: "all casual employees employed by Family and Children Services of St. Thomas and Elgin in the Town of St. Thomas and Elgin County, save and except supervisors and persons above the rank of supervisor, human resources/quality assurance, bookkeeper, executive assistant, contract employees and students on placement with the agency, or employed during the summer period" (10 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

4264-05-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. L & L Painting and Decorating Ltd. (Respondent)

2029-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. William Neilson Ltd./Ltee (Respondent) v. Christian Labour Association of Canada (Intervener)

2173-07-R: Teamsters Local Union No. 938 (Applicant) v. Brampton Transit (Respondent)

Unit: "all full time co-ordinators employed at Brampton Transit in the City of Brampton, Ontario, save and except shop foremen and persons above the rank of foreman, system administrators, administration clerks, the director's assistant and students employed during school vacation" (25 employees in unit)

Applications for Certification Dismissed Subsequent to Vote

3108-03-R: Labourers' International Union of North America, Local 506 (Applicant) v. Burling-Ranger Company Inc. a subsidiary of Burling-Ranger Company Limited (Respondent)

Unit: "all construction labourers in the employ of Burling-Ranger Company Inc. a subsidiary of Burling-Ranger Company Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Burling-Ranger Company Inc. a subsidiary of Burling-Ranger Company Limited in all in all other sectors of the construction industry in the City of of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in unit)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	21
Number of ballots segregated and not counted	8

3416-06-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stuart McLean Enterprises Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry in the County of

Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non working-foreman" (2 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0667-07-R: Teamsters Local Union 91 (Applicant) v. Al Parkhurst Transportation Ltd. (Respondent)

Unit: "all school bus drivers employed by Al Parkhurst Transportation Ltd. and Morton Bus Transportation Limited, owned and operated by Al Parkhurst Transportation Ltd., working in and out of the yard at 125 College Street East, Belleville, Ontario, for the Tri-Board School Transportation Authority, save and except supervisors, persons above the rank of supervisor, co-ordinators, dispatchers, mechanics, owners, monitors, mobility, coach or city drivers and full-time or part-time office/clerical staff." (50 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	33
Number of ballots segregated and not counted	6

1114-07-R: Canadian Union of Public Employees (Applicant) v. Peel Children's Aid Society (Respondent)

Unit: "all child protection support workers (which includes all employees of Peel Children's Aid Society engaged in direct services to children including intake workers, family services workers and children's services workers (residential and non-residential)) employed by Peel Children's Aid Society in the Region of Peel, save and except supervisors and persons above the rank of supervisor and clerical support staff" (120 employees in unit)

1604-07-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Hanson Pipe and Products Canada Inc. (Respondent) v. Hyprescon International Inc. (Intervener)

Unit: "all employees of Hanson Pipe and Products Canada Inc. and/or Hyprescon International Inc., in the Township of Uxbridge, save and except supervisors, persons above the rank of supervisor, sales, technical, office and clerical staff" (41 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of segregated ballots cast by persons whose names appear on voter's list	2

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	2

1634-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Cando Rail Services Ltd. and Cando Contracting Ltd. (Respondent)

Unit: "all employees of Cando Rail Services Ltd. and/or Cando Contracting Ltd. working in and out of 6830 Rutherford Road, Kleinburg, Ontario, save and except supervisors, persons above the rank of supervisors and office, sales and clerical staff" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

1959-07-R: International Association of Machinists and Aerospace Workers (Applicant) v. HMC Toronto Airport Inc. o/a Toronto Airport Marriott (Respondent)

Unit: "all employees of HMC Toronto Airport Inc. at 901 Dixon Road in the City of Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, office, clerical and engineering staff, loss prevention and security staff" (139 employees in unit)

Number of names of persons on revised voters' list	164
Number of persons who cast ballots	159
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	133
Number of segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	101
Number of ballots segregated and not counted	26

2081-07-R: McMaster Operations and Maintenance Workers Trade Union (Applicant) v. McMaster University (Respondent) v. Service Employees International Union Local 2, The Brewery, General and Professional Workers Union (Intervener)

Unit: "all employees of the University involved in the maintenance and service of grounds and buildings of the University on its present campus, save and except: a) supervisors and persons above the rank of supervisor; b) stationary engineers and persons primarily engaged as their helpers; c) employees in other bargaining units for which any trade union holds bargaining rights under The Labour Relations Act; d) persons regularly employed for not more than twenty-four (24) [sic] per week; and e) students hired for the school vacation period." (235 employees in unit)

Number of names of persons on revised voters' list	235
Number of persons who cast ballots	197
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	194
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	52
Number of ballots marked in favour of intervener	143
Number of ballots segregated and not counted	0

2120-07-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of St. Marys (Respondent)

Unit: "all employees employed by the Corporation of the Town of St. Mary's, save and except supervisors, persons above the rank of supervisor and seasonal employees and students" (87 employees in unit)

Number of names of persons on revised voters' list	105
Number of persons who cast ballots	75
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	63
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	39
Number of ballots segregated and not counted	11

2126-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Carman Construction Inc. (Respondent)

Unit: "all employees of Carman Construction Inc. working in the city of Timmins, Ontario, save and except non-working forepersons and persons above the rank of non-working forepersons, office staff, clerical staff and sales staff" (16 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	4

2142-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Tasse Automobiles Ltd. (Respondent)

Unit: "all employees of Tasse Automobiles Ltd. in the City of Greater Sudbury, save and except managers and persons above the rank of manager, office and clerical staff, and sales consultants" (9 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

0799-99-R; 0816-99-R; 0817-99-R: International Union of Operating Engineers, Local 793 (Applicant) v. Graham Bros. Construction Limited (Respondent); Labourers' International Union of North America, Local 183 (Applicant) v. Graham Bros. Construction Limited (Respondent); Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers affiliated with the International Brotherhood of Teamsters (Applicant) v. Graham Bros. Construction Limited (Respondent)

0394-05-R: Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Greyleith Engineering and Construction (Canada) Ltd. (Respondent)

1262-05-R; 2648-05-R: Teamsters Local Union No. 938 (Applicant) v. UPS Supply Chain Solutions Inc. (Respondent); Teamsters Local Union No. 938 (Applicant) v. UPS SCS, Inc. (Respondent)

0696-07-R: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2041 (Applicant) v. Durabuilt Construction Inc. (Respondent)

1472-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Burlington Drywall Inc. (Respondent)

2283-07-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. United Food and Commercial Workers International Union, CLC (Respondent)

2311-07-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Edsask Properties Ltd. c.o.b. Valhalla Inn (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1802-05-R; 2627-06-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Donald J. Collins, Linesteel Inc., Linesteel (1973) Limited, Collin Erectors, Iron Eagle Steel Inc., Kingline Steel Erectors Limited and Tradescape Corp. (Respondents); International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Donald J. Collins, Collin Erectors Inc., Iron Eagle Steel Inc., Linesteel Inc., Linesteel (1973) Limited, Kingline Steel Erectors Ltd. and Tradescape Corp. (Respondents) *(Withdrawn)*

3362-05-R; 3237-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tabrco Management Ltd. and, Target Drywall & Acoustics Ltd. (Respondents) *(Granted)*; Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tabrco Management Ltd.,, Target Drywall & Acoustics Ltd. and, PBS General Contractors Inc. (Respondents) v. Canadian Construction Workers' Union (Intervener) *(Withdrawn)*

0747-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 252 and 397 (Applicant) v. Fruehauf Canada Inc., and, Fruehauf Canada, a Division of the Brantford Group of Companies Ltd., and, Gemala Industries Limited, Trailmobile Canada Limited and, Gemala Trading Canada Limited (Respondents) *(Dismissed)*

3050-06-R: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sam Passarello o/a Keycraft Locksmith Company and, Ace Locksmiths Inc. o/a Ace Locksmith Company Don's Lock Service Ace Lock & Style Raceway Locksmiths Imperial Lock & Safe Imperial Access Controls and Danforth Lock and Safe (Respondents) *(Granted)*

3450-06-R: Ontario Council of the International Union of Painters and Allied Trades (Applicant) v. Target Drywall & Acoustics Ltd. and, PBS General Contractors Inc. (Respondents) v. Canadian Construction Workers' Union (Intervener) *(Withdrawn)*

3999-06-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Granolite Company Limited, Canex Wall Systems Inc. (Respondents) *(Withdrawn)*

1340-07-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Western Ontario Sprayed Systems Limited and/or, Western Ontario Drywall Limited (Respondents) *(Withdrawn)*

1553-07-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wade Gordon Cruise c.o.b. as Delta Contracting, A.G.P. Construction Inc. (Respondents) *(Terminated)*

SALE OF A BUSINESS

1802-05-R; 2627-06-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Donald J. Collins, Linesteel Inc., Linesteel (1973) Limited, Collin Erectors, Iron Eagle Steel Inc., Kingline Steel Erectors Limited and Tradescape Corp. (Respondents); International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Donald J. Collins, Collin Erectors Inc., Iron Eagle Steel Inc., Linesteel Inc., Linesteel (1973) Limited, Kingline Steel Erectors Ltd. and Tradescape Corp. (Respondents) *(Withdrawn)*

3362-05-R; 3237-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tabrco Management Ltd. and, Target Drywall & Acoustics Ltd. (Respondents) *(Granted)*; Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tabrco Management Ltd.,, Target Drywall & Acoustics Ltd. and, PBS General Contractors Inc. (Respondents) v. Canadian Construction Workers' Union (Intervener) *(Withdrawn)*

0747-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 252 and 397 (Applicant) v. Fruehauf Canada Inc., and, Fruehauf Canada, a Division of the Brantford Group of Companies Ltd., and, Gemala Industries Limited, Trailmobile Canada Limited and, Gemala Trading Canada Limited (Respondents) *(Dismissed)*

3050-06-R: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sam Passarello o/a Keycraft Locksmith Company and, Ace Locksmiths Inc. o/a Ace Locksmith Company Don's Lock Service Ace Lock & Style Raceway Locksmiths Imperial Lock & Safe Imperial Access Controls and Danforth Lock and Safe (Respondents) *(Granted)*

3450-06-R: Ontario Council of the International Union of Painters and Allied Trades (Applicant) v. Target Drywall & Acoustics Ltd. and, PBS General Contractors Inc. (Respondents) v. Canadian Construction Workers' Union (Intervener) *(Withdrawn)*

3999-06-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Granolite Company Limited, Canex Wall Systems Inc. (Respondents) *(Withdrawn)*

1340-07-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Western Ontario Sprayed Systems Limited and/or, Western Ontario Drywall Limited (Respondents) *(Withdrawn)*

1553-07-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wade Gordon Cruise c.o.b. as Delta Contracting, A.G.P. Construction Inc. (Respondents) *(Terminated)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3800-05-R: Bonnie Robin MacDougall (Applicant) v. Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Respondent) v. Addiction Outreach Muskoka Parry Sound (Intervener) *(Granted)*

Unit: "all employees at Addiction Outreach Muskoka Parry Sound (AOMPS), save and except the Executive Director, Clinical Supervisor, Bookkeeper, those on work experience placement and co-op programs" (11 employees in unit)

4031-06-R: Olaf Kallsen (Applicant) v. International Brotherhood of Electrical Workers Locals 105, 353 and The International Brotherhood of Electrical Workers Construction Council of Ontario (Respondent) *(Dismissed)*
Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of 1141002 Ontario Ltd. c.o.b. as Advantage Electric in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Dismissed)*

0284-07-R: Tom Cayer an employee of Cayer Tree Removal Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Cayer Tree Removal Ltd. (Intervener) *(Granted)*

Unit: "all employees of Cayer Tree Removal engaged in the operation of cranes, shovels, bulldozers or similar equipment and those particularly engaged in the repairing or maintenance of same, and employees engaged as surveyors in the Province of Ontario." (1 employee in unit)

0336-07-R: Tariel Gambarashvili (Applicant) v. Sheet Metal Workers' International Association Local Union No. 30 and Ontario Sheet Metal Workers & Roofers Conference (Respondent) v. 1440842 Ontario Inc. o/a Kyiv Architectural Metals (Intervener) *(Withdrawn)*

Unit: "all certified journeymen sheet metal workers, registered apprentices, sheeters, deckers, welders, sheeter's assistants, material handlers and probationary employees in the employ of the employer for all sectors of the construction industry and non-construction industry work throughout the Province of Ontario. & all employees engaged in but not limited to the application of roofing, damp roofing and waterproofing material of any description whatsoever in the employ of the employer for all sectors of the construction industry and non-construction work throughout the Province of Ontario." (3 employees in unit)

1883-07-R: Margaret Jessop (Applicant) v. COPE Ontario, Canadian Office & Professional Employees Union Local 343 (Respondent) v. UFCW Canada (Intervener) *(Granted)*

Unit: "UFCW Canada recognizes the Union as the sole and exclusive bargaining agent for its office and clerical employees employed in Canada, but excluding all persons who are covered by another collective bargaining agreement. It is expressly agreed that the Confidential Secretaries to the National Director, Executive Assistants to the National Director, Assistants to the National Director, Collective Bargaining Representatives, and professional staff are supervisors and are not within the bargaining unit" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

2002-07-R: Derek Green (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW) Local 414 (Respondent) v. Indigo Books & Music Inc. (Intervener) *(Granted)*

Unit: "all employees of the Employer employed at its store at 20 Edward Street in the Municipality of Metropolitan Toronto, Ontario ("the Store") save and except Customer Experience Coordinators (CECs) Customer Experience managers (CEMs), and the General Manager (GM)" (54 employees in unit)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	20
Number of ballots marked against respondent	27
Number of ballots segregated and not counted	0

2075-07-R: Tazim Lakhani, Wilma Batan (Applicant) v. Canadian Union of Public Employees Local 4112 (Respondent) v. Saint Elizabeth Health Care (Intervener) *(Granted)*

Unit: "all office and clerical employees of Saint Elizabeth Health Care in the Regional Municipality of Metropolitan Toronto, save and except Payroll/Benefits Coordinator, Public Relations Assistant, Executive Assistant to the President, Secretary to the General Manager, Human Resources Associate, Human Resources Clerk, Human Resources Assistant, Supervisors and persons above the rank of Supervisor" (42 employees in unit)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	32

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	15
Number of ballots marked against respondent	17

2109-07-R: Herman Vandermeulen Employees of Alpine International Transportation (Applicant) v. Teamsters Local Union No. 879 (Respondent) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2365-07-U: ECP LP (formerly Flexia Corporation) (Applicant) v. United Steelworkers of America (USW), Local I-500 (formerly Industrial Wood and Allied Workers, Local I-500) (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2192-07-U: Amcan Consolidated Technologies Corp. (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) and its Local 4153 (Respondent) *(Withdrawn)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0800-99-U; 1072-99-U; 1252-01-U: International Union of Operating Engineers, Local 793 (Applicant) v. Graham Bros. Construction Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener); Labourers' International Union of North America, Local 183 (Applicant) v. Graham Bros. Construction Limited (Respondent); Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers affiliated with the International Brotherhood of Teamsters (Applicant) v. Graham Bros. Construction Limited (Respondent) v. International Union of Operating Engineers, Local 793, Universal Workers Union, Labourers' International Union of North America, Local 183 (Interveners) *(Withdrawn)*

3251-03-U: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Canadian Niagara Hotels Inc. (Respondent) *(Withdrawn)*

0647-05-U: Michael Alleyn McKenzie (Applicant) v. United Steelworkers of Ameria Local 9597 (Respondent) v. Securitas Canada (Intervener) *(Dismissed)*

0696-05-U: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Greyleith Engineering and Construction (Canada) Ltd. (Respondent) *(Withdrawn)*

1457-05-U; 2828-05-U; 3379-05-U: Teamsters, Local 938 (Applicant) v. UPS Supply Chain Solutions Inc. (Respondent) *(Withdrawn)*

2299-05-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Marshall Homes Corporation and/or Marshall Homes (Copperfield) Ltd. (Respondent) *(Withdrawn)*

2692-05-U; 3002-05-U: Louise Reynen (Applicant) v. Ontario English Catholic Teachers Association ("OECTA") (Respondent) v. Waterloo Catholic District School Board (Intervener) *(Dismissed)*

3327-05-U: Linesteel Inc., Linesteel (1973) Limited, Kingline Steel Erectors Ltd. and Tradescape Corp. (Applicants) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Respondent) *(Withdrawn)*

0069-06-U: The International Union of Painters and Allied Trades, Local 557 (Applicant) v. L & L Painting and Decorating Ltd. (Respondent) *(Granted)*

0709-06-U: Toronto Transit Commission (Applicant) v. Amalgamated Transit Union, Local 113, Bob Kinnear, Paul McLaughlin, Larry Davis, Steve Anthony, Les Moore, Jim Boyle, Paul Callaghan, Bill Chrisp, Scott Gordon, Frank Grimaldi, Rick Hughes, Cosimo Lacaria, Kevin Morton, Paul Prosser, Philip Quibell and Henry Urban (Respondent) *(Withdrawn)*

1224-06-U: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Addiction Outreach Muskoka Parry Sound (Respondent) *(Granted)*

1448-06-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, Affiliated with the International Brotherhood of Teamsters (Applicant) v. The Brick Warehouse LP (Respondent) *(Withdrawn)*

2040-06-U: Timothy Fowler (Applicant) v. Teamsters Local No. 879 (Respondent) v. King Paving & Materials Company (Intervener) *(Dismissed)*

2320-06-U: Amalgamated Transit Union Local 113 (Applicant) v. Toronto Transit Commission (Respondent) *(Withdrawn)*

2908-06-U: Blake Cromwell (Applicant) v. Bakery Confectionery, Tobacco and Grain Millers Union Local 242G (Respondent) v. Bakery Confectionery, Tobacco and Grain Millers International Union (Intervener) *(Dismissed)*

3040-06-U: Ama Attah (Applicant) v. Teamsters Local Union No. 419 (Respondent) v. Quality Meat Group Ltd. (Intervener) *(Dismissed)*

3070-06-U: UFCW Canada, UFCW Canada, Local 1993 (Applicant) v. Ride Management Ltd. (Respondent) *(Endorsed Settlement)*

3238-06-U: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tabrco Management Ltd.,, Target Drywall & Acoustics Ltd.,, PBS General Contractors Inc. and, Canadian Construction Workers' Union (Respondents) *(Withdrawn)*

3347-06-U: Martin Arsenault (Applicant) v. Teamsters Local Union No. 91 (Respondent) v. Farley Windows (Intervener) *(Dismissed)*

0104-07-U: Allen McKinnon (Applicant) v. C.E.P. Local 90 (Respondent) v. Abitibi-Consolidated Company of Canada (Intervener) *(Withdrawn)*

0185-07-U: Elementary Teachers' Federation of Ontario (Applicant) v. Lambton Kent District School Board, Nancy Blandford-McFadden and Mac Leitch (Respondent) *(Withdrawn)*

0575-07-U: Marcos Stevens (Applicant) v. Canadian National Federation of Independent Unions Local 3000 (Respondent) *(Withdrawn)*

0609-07-U: Danny G. Smith (Applicant) v. Local 252, CAW TCA Canada (Respondent) v. Nestle Canada Inc. (Intervener) *(Withdrawn)*

0714-07-U: Teamsters Local Union No. 879 (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as OLG Casino Point Edward (Respondent) *(Withdrawn)*

0749-07-U: Teamsters Local Union 91 (Applicant) v. Al Parkhurst Transportation Ltd. (Respondent) *(Withdrawn)*

0771-07-U: Keith Langlois (Applicant) v. CAW, Local 200 (Respondent) *(Dismissed)*

0855-07-U: Helena Silva Lilla Gumbinger John Diensthuber Mark Finney (Applicant) v. National Automobile, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. DaimlerChrysler Canada Inc. (Intervener) *(Dismissed)*

1009-07-U: Aime Charrette (Applicant) v. Canadian Union of Public Employees (Respondent) *(Withdrawn)*

1276-07-U: Canadian Union of Public Employees and its Local 2044 (Applicant) v. Leamington District Hospital (Respondent) *(Withdrawn)*

1444-07-U: Donna Hilditch (Applicant) v. Canadian Union of Public Employees and its Local 1750 (Respondent) *(Dismissed)*

1447-07-U: Marie-Jeanne Drolet (Applicant) v. Canadian Union of Public Employees, Local 8888 (Respondent) *(Withdrawn)*

1486-07-U: Sheet Metal Workers International Association Local Union No. 285 (Applicant) v. D & R Heating Contractors Limited and, 669857 Ontario Limited c.o.b. as Alma Mechanical (Respondents) *(Withdrawn)*

1527-07-U: Canadian Union of Public Employees and its Local 3224 (Applicant) v. Chester Village (Respondent) *(Withdrawn)*

1570-07-U: Service Employees International Union Local 1.on (Applicant) v. The/Le Elmsmere Residence (Respondent) *(Terminated)*

1619-07-U: William Matsigaris (Applicant) v. International Brotherhood of Electrical Workers, Local 353, International Brotherhood of Electrical Workers (Respondents) *(Terminated)*

1637-07-U: Randy Smith (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Complex Services Inc. (Intervener) *(Withdrawn)*

1673-07-U: Mary Ellen Tippin (Applicant) v. Canadian Union of Public Employees, Local 54 (Respondent) v. Town of Ajax (Intervener) *(Withdrawn)*

1688-07-U: Bill Facto (Applicant) v. Teamsters Local Union 647 (Respondent) *(Withdrawn)*

1715-07-U: Jason Bressette (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Respondent) v. Master Insulators Association; and Joint Apprenticeship Committee (Intervener) *(Withdrawn)*

1727-07-U: Ontario Public Service Employees Union (Applicant) v. Kenora Association for Community Living (Respondent) *(Withdrawn)*

1825-07-U: International Association of Machinists and Aerospace Workers, District Lodge 140 (Applicant) v. Bee Clean Building Maintenance (Respondent) *(Withdrawn)*

1845-07-U: Garnet Mason (Applicant) v. CAW Local 4268 (Respondent) *(Dismissed)*

1861-07-U: David Wigle (Applicant) v. International Brotherhood of Electrical Workers, Local 742 (Respondent) v. Atomic Energy of Canada Limited (Intervener) *(Dismissed)*

1871-07-U: Labourers' International Union of North America, Local 527 (Applicant) v. Ingleside Fencing operating as Fence Depot a division of Ingleside Fencing, and, John Locke (Respondents) *(Withdrawn)*

1975-07-U: Ontario Public Service Employees Union (Applicant) v. Elizabeth Fry Society of Toronto (Respondent) *(Withdrawn)*

2058-07-U: Brian Bockus (Applicant) v. Retail, Wholesale and Department Store Union (RWDSU) (Respondent) *(Dismissed)*

2131-07-U: Mark Willard (Applicant) v. Retail, Wholesale and Department Store Union (RWDSU) (Respondent) v. Grant Home Hardware (Intervener) *(Dismissed)*

2271-07-U: United Food and Commercial Workers Union, Local 1977 (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

0715-07-M: Teamsters Local Union No. 879 (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b as OLG Casino Point Edward (Respondent) *(Withdrawn)*

1824-07-M: International Association of Machinists and Aerospace Workers, District Lodge 140 (Applicant) v. Bee Clean Building Maintenance (Respondent) *(Withdrawn)*

1902-07-M: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Barry Gibson (Applicant) v. Superior Boiler Works and Welding Limited (Respondent) *(Endorsed Settlement)*

2254-07-M: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Constructions Drivers, Warehousemen and Helpers (Applicant) v. Metrix Ready Mix Ltd. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO PROSECUTE

2057-07-U: Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (Applicant) v. Provincial Advocate for Children and Youth and Agnes Samler (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2034-07-M: Loeb Canada Inc. c/o as Loeb Southgate (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

0631-06-JD; 0632-06-JD; 1782-06-JD; 2014-06-JD; 2368-06-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Strabag Inc.:, Ontario Power Generation Inc.:, Labourers' International Union of North America, Ontario Provincial District Council:, Labourers' International Union of North America, Local 837, Labourers' International Union of North America (Respondents) v. Electrical Power Systems Construction Association, Millwright Regional Council of Ontario, United Brotherhood of

Carpenters and Joiners of America and its Local 1007; (Interveners); Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 1007 (Applicant) v. Strabag Inc., Ontario Power Generation Inc., Electrical Power Systems Construction Association, Labourers International Union of North America, Ontario Provincial District Council, Labourers' International Union Of North America, Local 837, Labourers' International Union Of North America (Respondents) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 736 (Intervener) ; Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 18 (Applicant) v. Strabag Inc., Ontario Power Generation Inc., Electrical Power Systems Construction Association, Labourers' International Union of North America, Ontario Provincial District Council (Respondents) v. Labourers' International Union Of North America, Local 837, Labourers' International Union Of North America (Interveners) ; Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and its Local 18 (Applicant) v. Strabag Inc., Ontario Power Generation Inc., Electrical Power Systems Construction Association, Labourers International Union of North America, Ontario Provincial District Council (Respondents) *(Dismissed)*

2367-06-JD: 2513-06-JD: Brick and Allied Craft Union of Canada, Local 2 and International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Operative Plasterers', Cement Masons', Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 and, Clifford Restoration Limited/Clifford Masonry Limited (Respondents) v. Masonry Industry Employers' Council of Ontario (Intervener) *(Withdrawn)*

3431-06-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 721 (Applicant) v. Aristeo Construction (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener) *(Withdrawn)*

3464-06-JD: Sheet Metal Workers' International Association Local 30 (Applicant) v. Sutherland-Schultz Inc., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Respondents) *(Dismissed)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4112-06-OH; 0186-07-OH: Elementary Teachers' Federation of Ontario (Applicant) v. Lambton Kent District School Board and Warren Kennedy (Respondent); Elementary Teachers' Federation of Ontario and Jackie Pynaert (Applicant) v. Lambton Kent District School Board, Nancy Blandford-McFadden, David Doey (Respondent) *(Withdrawn)*

1375-07-OH: Jean Laczo (Applicant) v. Sorensen Greenhouses Inc. (Respondent) *(Withdrawn)*

1394-07-OH: Mike McCullough (Applicant) v. Steve Saunders (Respondent) v. Katy Mason (Intervener) *(Withdrawn)*

1557-07-OH: Ian Phillip (Applicant) v. McCaustlin Group (Respondent) *(Withdrawn)*

1567-07-OH: Asitha Sanjeewa Perumathantri (Applicant) v. Fixation R & M Service Ltd. (Respondent) *(Endorsed Settlement)*

1742-07-OH: Trevor Fish (Applicant) v. Stantec Consulting Ltd. (Respondent) *(Withdrawn)*

1877-07-OH: Paulo Alonso (Applicant) v. NAPA Auto Parts, UAP Inc. (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

1803-05-G; 0375-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Linesteel Inc. and, Linesteel (1973) Limited (Respondents) *(Withdrawn)*

3361-05-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Target Drywall & Acoustics Ltd. (Respondent) *(Dismissed)*

0264-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Pro-Bel Enterprises Limited (Respondent) *(Withdrawn)*

1377-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Aristeo Construction International (Respondent) *(Withdrawn)*

1456-06-G: Ontario Power Generation Inc. (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) *(Dismissed)*

2163-06-G; 2352-06-G: Operative Plasterers', Cement Masons' and Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 (Applicant) v. Clifford Restoration Limited/Clifford Masonry Limited (Respondent) v. Brick and Allied Craft Union of Canada, Local 2 (Intervener) *(Withdrawn)*

3051-06-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sam Passarello o/a Keycraft Locksmith Company, Ace Locksmiths Inc. o/a Ace Locksmith Company Don's Lock Service Ace Lock & Style Raceway Locksmiths Imperial Lock & Safe Imperial Access Controls and Danforth Lock and Safe (Respondents) *(Granted)*

3460-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. Don Cordingley Gradall Rental Ltd. (Respondent) *(Dismissed)*

3663-06-G; 0898-07-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 1669 (Applicant) v. Jamel Contracting Ltd. (Respondent) *(Withdrawn)*

3751-06-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Proto Electric Contracting Inc. (Respondent) *(Endorsed Settlement)*

0525-07-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. C.S.E. Corporation c.o.b. Concept System Electric, Ozz Infrastructure Solutions Inc. (Respondents) *(Terminated)*

0680-07-G: International Union of Bricklayers and Allied Craftworkers, Local 12 (Applicant) v. Limen Masonry Limited and/or, Limen Enterprises (2003) Inc. (Respondents) *(Terminated)*

1309-07-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. W.S. Nicholls Construction Inc. and, W.S. Nicholls Industries Inc. (Respondents) *(Withdrawn)*

1362-07-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Thunderwood Millwork Ltd. (Respondent) *(Granted)*

1462-07-G: Greater Ontario Regional Council of Carpenters & Allied Workers, United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Walls.Com Inc. (Respondent) *(Granted)*

1554-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wade Gordon Cruise c.o.b. as Delta Contracting, A.G.P. Construction Inc. (Respondents) *(Endorsed Settlement)*

1843-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. 2001 Enviro Inc. (Respondent) *(Endorsed Settlement)*

1864-07-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. MFloors Inc. (Respondent) *(Endorsed Settlement)*

1919-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. T.P. Erection Company Ltd. (Respondent) *(Granted)*

1922-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Matlor Steel Construction Limited (Respondent) *(Withdrawn)*

1944-07-G; 1945-07-G; 1946-07-G; 1947-07-G; 1948-07-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. City of Toronto (Respondent) *(Withdrawn)*

1980-07-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Kennedy Electric Limited, Kennedy Automation Limited, Max Automated Processing Limited (Respondent) *(Granted)*

1986-07-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Vanbet Services Inc. (Respondent) *(Granted)*

2006-07-G: International Brotherhood of Electrical Workers, Local 530 (Applicant) v. Burns and Roe Enterprises, Sarnia Construction Association (Respondents) *(Withdrawn)*

2013-07-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1232427 Ontario Ltd. c.o.b. as TGM Services, Marksbury Group Ltd. (Respondent) *(Granted)*

2020-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yustin Interiors Ltd. and, Deborah Yustin (Respondents) *(Endorsed Settlement)*

2037-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barry Alexander Riddell c.o.b. as Riddell Contracting (Respondent) *(Granted)*

2038-07-G: International Association of Bridge, Structural, Ornamental And Reinforcing Iron Workers, Local 721 (Applicant) v. K.C. Welding Ltd. (Respondent) *(Withdrawn)*

2049-07-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. El Decor Ltd. (Respondent) *(Granted)*

2060-07-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Yustin Interiors Limited and David Yustin (Director) and Deborah Yustin (Director) (Respondent) *(Endorsed Settlement)*

2090-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Sherwood Windows Ltd. (Respondent) *(Endorsed Settlement)*

2106-07-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Veugen Integrated Technologies Ltd. (Respondent) *(Endorsed Settlement)*

2140-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bianchi Contracting (2004) Inc. (Respondent) *(Granted)*

2158-07-G: Millwright Regional Council of Ontario and its Local 1007 (Applicant) v. 1673524 Ontario Inc. c.o.b. Canadian Industrial Millwrighting and Rigging and, Lou Bratty (Director) and, Jou Bratty (Director) (Respondents) *(Granted)*

2189-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 3576698 Canada Inc., c.o.b. as Michael Seltzer's Le Biftheque Steakhouse ("Le Biftheque") and 3576655 Canada Inc. (the "Ontario Group") (Respondent) *(Withdrawn)*

2190-07-G: Labourers' International Union of North America, Local 506 (Applicant) v. Res 2000 (Respondent) *(Withdrawn)*

2228-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Brass Monkey Installations (BMI) Ltd. (Respondent) *(Granted)*

2229-07-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sport Systems Unlimited Corp. (Respondent) *(Granted)*

2256-07-G: Universal Worker's Union, L.I.U.N.A., Local 183 (Applicant) v. Clean-Rite Sewer Services, o/a 1343194 Ontario Limited (Respondent) *(Granted)*

2270-07-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Power Mechanical Inc. (Respondent) *(Endorsed Settlement)*

2280-07-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Vision Sheet Metal Inc. (Respondent) *(Granted)*

2293-07-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486, hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Joe Da Silva c.o.b. as JD Installations/JD Cold Rooms (Respondent) *(Granted)*

2299-07-G: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Youngs Architectural Glazing Ltd. (Respondent) *(Granted)*

2300-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ciccarelli & Sons Contracting Ltd. (Respondent) *(Granted)*

2330-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Veera Group Inc. (Respondent) *(Withdrawn)*

2342-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cayer Tree Removal Ltd. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

2966-03-ES: Govin Misir, a Director of SLMsoft Inc. (Applicant) v. Murat Tayfun Can et al and Director of Employment Standards (Respondents) *(Granted)*

3389-03-ES: Eddie Law, a Director of SLMsoft Inc. (Applicant) v. Murat Tayfun Can et al and Director of Employment Standards (Respondents) *(Granted)*

3390-03-ES: Dr. Budhendranauth Doobay, Director of SLMsoft Inc. (Applicant) v. Murat Tayfun Can et al and, Director of Employment Standards (Respondents) *(Granted)*

4465-04-ES: Leo Samual Corbit (Applicant) v. B.R.E.S.T. Transportation Ltd., and Director of Employment Standards (Respondents) *(Dismissed)*

0680-05-ES: Collective Minds Consulting Inc. (Applicant) v. Bill Albert, Shannon Allhusen, Leah Bachelder, Stephen Barrett, Anthony Bartone, Michael Bennison, Julien Bouchard, David Boucher, Marc Brazeau, Kris Brunet, Colin Byham, Jamy Cartwright, Jeff Charbonneau, Colleen Charland, Lise Corbeil, Shari Defrancesco, Laina Dominelli, Chris Doyle, David Drysdale, Kent Duchesne, Jeff Dufresne, Steven Dufresne, Rachelle Duguay, Michael Foucault , Chad Franklin, Roger Gagne, Krystal-Lyn, Jeff Goguen, James Gough, Trayz Gredner, Paul Harding, Michael Harney, Gordon Helson, Robert Heroux, Cathy Hogan, Csaba Horvath, Dave Houston, James Keir, Jim Kirk, Jason Kruckel, Tyler Lance, Gord Laporte, Rick Larochelle, Mike Legault, Tammy Legault, Michael Lippel, Shane Macdonald, Ian MacPhee, Robert Martin, Marc Mayotte, Jeff McCann, David Mewett, Terry Moore, Robert Morrow, Jaana Munroe, Kelli Murray, Jordan Neal, Dave Peters, Edward Price, Nick Reed, Anthony Romaine, Kathleen Ross , Roy Sommer, Shelly Tillotson, Rachel Toeppner, Anthony Van Oosten, Blaine Vautour, Sandra Vezina, Director of Employment Standards (Respondents) *(Granted)*

0681-05-ES; 0682-05-ES; 0742-05-ES; 0743-05-ES; 0744-05-ES; 0745-05-ES; 0746-05-ES; 0748-05-ES; 0800-05-ES: Rob Martin (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Mike Lippel (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Tammy Legault (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Mike Legault (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); James Keir (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Cathy Hogan (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Anthony Bartone (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Trayz Gredner (Applicant) v. Collective Minds Consulting Inc. and Director of Employment Standards (Respondents); Michael Harney (Applicant) v. Collective Minds Consulting Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

4183-05-ES: Pocketz Pita Company Inc. (Applicant) v. Penny Boyce and, Director of Employment Standards (Respondents) *(Terminated)*

1240-06-ES: The Climatic Group Inc. (Applicant) v. Rosa Chacon and, Director of Employment Standards (Respondents) *(Granted)*

1357-06-ES: Joe Mitchell (Applicant) v. Falcon Environmental Services, Director of Employment Standards (Respondents) *(Terminated)*

1670-06-ES: Hearing Health Clinic/Clinique de Sante Auditive (HHC/CSA) Inc. (Applicant) v. Danielle Lamoureux and, Director of Employment Standards (Respondents) *(Granted)*

1834-06-ES: Amurthalingam Sachithananthasivam (Applicant) v. Global Upholstery Co. Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2560-06-ES: Highbury Ford Sales Limited (Applicant) v. Correy Ludwar, and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2638-06-ES: James Alan Hunter (Applicant) v. Canada Bonded Attorney and Legal Directory Limited and Director of Employment Standards (Respondents) *(Withdrawn)*

2664-06-ES: Milkyway Phan (Applicant) v. JCD Holdings Inc. o/a Envirotreads, Director of Employment Standards (Respondents) *(Granted)*

2797-06-ES: Tiffany Cassibo (Applicant) v. Hospitality Motels Limited and Director of Employment Standards (Respondents) *(Granted)*

3118-06-ES: FAG Aerospace Inc. (Applicant) v. Chris Neal and Director of Employment Standards (Respondents) *(Granted)*

3150-06-ES: Kennedy House Youth Services Inc. (Applicant) v. Richmond Oppong and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3325-06-ES: Ontario Chemists Rx Inc. (Applicant) v. Madlin Ibrahim and Director of Employment Standards (Respondents) *(Granted)*

3342-06-ES: Dr. Neil Mati, operating as Leslie Walk In Clinic (Applicant) v. Sepideh Moaref-Jahromi and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3859-06-ES: Nathalie Poulin (Applicant) v. Belanger Pontiac and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3911-06-ES: Nick Badzic (Applicant) v. Kelly Services (Canada) and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3912-06-ES: Ian Maze (Applicant) v. Premier Peterbilt Inc., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4015-06-ES: Mustafa Daginawala (Applicant) v. Supply Chain Management Inc., and Director of Employment Standards (Respondents) *(Dismissed)*

4085-06-ES: Robert Burton (Applicant) v. Toronto Auto Auction and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0041-07-ES: Spoon Holdings Inc. o/a Spoon Restaurant-Lounge (Applicant) v. Jesse Fader, Director of Employment Standards (Respondents) *(Dismissed)*

0048-07-ES: Kozy Inn (Applicant) v. Mohammad Khan and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0131-07-ES: Metaplast Circuits Limited (Applicant) v. Mr. Anastacio Ambas, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0280-07-ES: 1115992 Ontario Limited o/a Micki's Concord Marketing (Applicant) v. Seymour Jackson and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0295-07-ES: Keaney Interiors Ltd. (Applicant) v. Sandra Raymond and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0302-07-ES: Jane E. L'Esperance (Applicant) v. Dr. John VanDeursen and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0537-07-ES: Gail Trotman (Applicant) v. Doubleday Canada Limited and Director of Employment Standards (Respondents) *(Dismissed)*

0574-07-ES: Ronald Plese (Applicant) v. Toronto District School Board and Director of Employment Standards (Respondents) *(Dismissed)*

0661-07-ES: Uptown Communications (Applicant) v. Ian Doty and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0678-07-ES: Jennifer Axelrod (Applicant) v. Arctic Packaging Industries Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

0738-07-ES: Vari-Form Inc. (Applicant) v. Mark Thomas and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0868-07-ES: Bill Coutlee (Applicant) v. Falcon Security Company and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0895-07-ES: Mrs. Terri Hutton (Applicant) v. Tender Corp/Canada and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1065-07-ES: Jay-R-Enterprize (Applicant) v. Ken Hardy and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1088-07-ES: Harry Rosen Inc. (Applicant) v. Benny Indelicato and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1090-07-ES: Evan Dwyer (Applicant) v. Starshine Cleaning Services, and Director of Employment Standards (Respondents) *(Granted)*

1091-07-ES: Tony Zografox (Applicant) v. ABL Employment and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1156-07-ES: Starbucks Coffee Company Inc. (Applicant) v. Cecilia Alsosa-Cueto and Director of Employment Standards (Respondents) *(Dismissed)*

1189-07-ES: Matas Management Services Inc. (Applicant) v. Hardave Sidhu and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1192-07-ES: C.W. Wholesale Lubricant Distributors Inc. (Applicant) v. Joe Gardiner and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1196-07-ES: William Jefferson (Applicant) v. Probe Investigation and Security Services Ltd., Director of Employment Standards (Respondents) *(Withdrawn)*

1238-07-ES: 3956440 Canada Inc. (Applicant) v. Joe Maksoud and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1240-07-ES: John Kois o/a Bala Grill & Steakhouse (Applicant) v. Eric Rubery and Director of Employment Standards (Respondents) *(Dismissed)*

1243-07-ES: Wayne McDonald (Applicant) v. Jerry and Dorit Mazor and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1295-07-ES: Fort Erie Licence Bureau (Applicant) v. Doreen McKee and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1314-07-ES; 1315-07-ES: Lucy Megaffin (nee Migas) a Director of On The Mark Graphics Inc. (Applicant) v. Nicole K. Drakes, Stephen D. Megaffin, Larry Baker, Lorraine Bates, Shawn Dannemann, Bryan Drakes, Calvin Genereux, Lauren Heise, Boris Medan, Elvira Mejia, Taryn Melia, Lalita A. Ramos, Jeff Simmons, Barry Thompson and, Director of Employment Standards (Respondents); Michael Megaffin, a Director of On The Mark Graphics Inc. (Applicant) v. Nicole K. Drakes, Stephen D. Megaffin, Larry Baker, Lorraine Bates, Shawn Dannemann, Bryan

Drakes, Calvin Genereux, Lauren Heise, Boris Medan, Elvira Mejia, Taryn Melia, Lalita A. Ramos, Jeff Simmons, Barry Thompson and, Director of Employment Standards (Respondents)

1349-07-ES: HDS Graphics Group Inc. (Applicant) v. Jim Smythe and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1364-07-ES: Gerald (Matt) Macleod (Applicant) v. Deb Dispensing Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1414-07-ES: L A Weight Loss Centers (Applicant) v. Nickeisha Urquhart, Director of Employment Standards (Respondents) *(Dismissed)*

1430-07-ES: Greg Milburn (Applicant) v. Triaxdesign Ltd., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1500-07-ES: Douglas I. Rayson (Applicant) v. Campbell Company of Canada and Director of Employment Standards (Respondents) *(Terminated)*

1501-07-ES: Mair Azagury (Applicant) v. Zemfira Abdullayeva and Director of Employment Standards (Respondents) *(Terminated)*

1503-07-ES: Helber A. Pena (Applicant) v. Kalex and Director of Employment Standards (Respondents) *(Dismissed)*

1546-07-ES: Cindy Ellig (Applicant) v. Nexcycle Industries Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1608-07-ES: Greene & Blaker Logistics Ltd. (Applicant) v. Michael Lanteigne and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1613-07-ES: Norma Ann Smith (Applicant) v. Great Wolf Lodge and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1614-07-ES: Vincent Petrasso (Applicant) v. A-One Auto Collision and Refinishing Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1625-07-ES: Peoplesource Staffing Solutions Inc. (Applicant) v. Stacy Toth, and Director of Employment Standards (Respondents) *(Terminated)*

1663-07-ES: Peter Corby Brant (Applicant) v. Coastal Garden Supply Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1665-07-ES: Lynn Vanderlans (Applicant) v. Josephine's Hair Studio/Josephine Gamble operating as Josephine's Hair Studio and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1694-07-ES: Circa Metals Inc. o/a Hydel Enterprises (Applicant) v. Terry Cooper and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1711-07-ES: Irina Sherman, Director of Environix Engineering Ltd. (Applicant) v. Eric Ruggles and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1714-07-ES: Drainville Ltd. (Applicant) v. Michael Walter and Director of Employment Standards (Respondents) *(Terminated)*

1766-07-ES: Daniel Nader's Insulation Design (Applicant) v. Louis Abouraphael and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1870-07-ES: Victor Nanoff (Applicant) v. Wigamog Inn Resort and Director of Employment Standards (Respondents) *(Dismissed)*

1878-07-ES: Natalie Thabet (Applicant) v. Pier 1 Imports (U.S.) Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1889-07-ES: Maple Rock Construction Inc. (Applicant) v. Brian Shawn Bolton and Director of Employment Standards (Respondents) *(Dismissed)*

2010-07-ES: Mona Nowrouzi (Applicant) v. Katz Group Canada Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2094-07-ES: Art Tao Inc. (Applicant) v. Tune (Allan) Kurtulus, Linda (Lyn) Kungl, Rachel Doner, and Director of Employment Standards (Respondents) *(Terminated)*

2177-07-ES: Direct Energy Essential Home Services (Applicant) v. Joan Bover and Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1733-06-HS: Manorcore Group Inc. and Norman Papineau (Applicant) v. Roger Fontaine, Inspector (Respondent) *(Withdrawn)*

3873-06-HS: Waste Management of Canada Corporation (Applicant) v. Stephen Kinsman, Inspector, Communications, Energy & Paperworkers Union of Canada (CLC) (Respondents) *(Withdrawn)*

0243-07-HS: Elementary Teachers' Federation of Ontario (Applicant) v. Lambton Kent District School Board, Brian Toner, Inspector (Respondents) *(Withdrawn)*

0508-07-HS: Elementary Teachers' Federation of Ontario (Applicant) v. Lambton Kent District School Board, Brian Toner and Ram Kaushal, Inspectors (Respondents) *(Withdrawn)*

0990-07-HS: Cornwall Community Hospital (Applicant) v. Tom Michaud, Inspector (Respondent) *(Withdrawn)*

1531-07-HS: The Corporation of the Town of Tillsonburg (Applicant) v. Suzette Earthart, Inspector (Respondent) *(Withdrawn)*

2077-07-HS: Gulick Forest Products Limited/Grant Gulick (Applicant) v. Steve Brennan, Inspector (Respondent) *(Dismissed)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

3162-06-PS: Ontario Nurses' Association (Applicant) v. Central West Community Care Access Centre Peel Community Care Access Centre Dufferin Community Care Access Centre Etobicoke Community Care Access Centre, Canadian Union of Public Employees, Canadian Office and Professional Employees Union (Respondents) *(Granted)*

3163-06-PS: Ontario Nurses' Association (Applicant) v. Mississauga Halton Community Care Access Centre, Etobicoke Community Care Access Centre, Halton Community Care Access Centre, Peel Community Care Access

Centre,, Canadian Union of Public Employees, Canadian Office and Professional Employees' Union (Respondents) *(Granted)*

0592-07-PS: Erie St. Clair Community Care Access Centre (Applicant) v. Canadian Union of Public Employees and its Local 3989 and, Service Employees' International Union Local 1.ON and , Canadian Union of Public Employees and its Local 3626 (Respondents) v. Ontario Nurses' Association (Intervener) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1668-06-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. TESC Contracting Company Ltd., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Respondents) *(Dismissed)*

0549-07-ES: 1609894 Ontario Inc. o/a Coffee Time (Brechin) (Applicant) v. Ms. Heather May, Director of Employment Standards (Respondents) *(Terminated)*

1102-07-U: Cynthia Ababio (Applicant) v. Service Employees International Union, Local 1.on (Respondent) *(Dismissed)*

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 2007

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0255-06-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. TISI Canada Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of TISI Canada Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of TISI Canada Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (37 employees in unit)

0938-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Western Ontario Sprayed Systems Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Western Ontario Sprayed Systems Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Western Ontario Sprayed Systems Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit) *(Clarity Note)*

1696-07-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. 924241 Ontario Inc. o/a Romeo & Romeo Concrete Finishing (Respondent)

Unit: "all construction labourers in the employ of 924241 Ontario Inc., o/a Romeo & Romeo Concrete Finishing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of 924242 Ontario Inc. o/a Romeo & Romeo Concrete Finishing in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (9 employees in unit) *(Clarity Note)*

2091-07-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Classic Electric Ltd. (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of Classic Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of Classic Electric Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2143-07-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Lunardo Plumbing Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices in the employ of Lunardo Plumbing Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers' apprentices in the employ of Lunardo Plumbing Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2152-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A1 Superior Paving & Concrete Works Company Inc. (Respondent)

Unit: "all construction labourers, all teamsters engaged in on-site construction and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the responding party in the District of Thunder Bay, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2199-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction (Respondent)

Unit: "all truck drivers in the employ of Ekum-Sekum Incorporated o/a Brantco Construction in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2257-07-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Molinnus Plumbing and Heating Ltd. (Respondent)

Unit: "all plumbers and plumbers apprentices and all pipefitters and pipefitters' apprentices in the employ of Molinnus Plumbing and Heating Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Molinnus Plumbing and Heating Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2371-07-R: Labourers' International Union of North America, Local 1059 (Applicant) v. AirZee Inc. (Respondent)

Unit: "all construction labourers in the employ of AirZee Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of AirZee Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2374-07-R: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2041 (Applicant) v. D.L.S. Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of D.L.S. Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of D.L.S. Construction Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2400-07-R: United Brotherhood of Carpenters and Joiners of America, Local 27 (Applicant) v. Italmex Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Italmex Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Italmex Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2401-07-R: United Brotherhood of Carpenters and Joiners of America, Local 27 (Applicant) v. Ontside Aluminum Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Ontside Aluminum Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Ontside Aluminum Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2407-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gedco Excavating Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same and employees engaged as surveyors in the employ of Gedco Excavating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same and employees engaged as surveyors in the employ of Gedco Excavating Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2446-07-R: The International Union of Painters and Allied Trades, Local 557 (Applicant) v. Miranda Painting Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Miranda Painting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Miranda Painting Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin; the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (37 employees in unit)

2495-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Saicon Construction Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Saicon Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Saicon Construction Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2535-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Straight Line Forming and Crane Rental (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Straight Line Forming and Crane Rental in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Straight Line Forming and Crane Rental in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2542-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Empire Continental Management Inc. c.o.b. as Empire Communities and/or Empire Homes and/or The Estates of Wyndance (Respondent)

Unit: "all construction labourers in the employ of Empire Continental Management Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2545-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bryte Designs and, Glulam & Timber Carpentry (Respondents)

Unit: "all carpenters and carpenters' apprentices in the employ of Bryte Designs and Glulam & Timber Company in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Bryte Designs and Glulam & Timber Company in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2555-07-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Southwood Mechanical Services Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices and steamfitters and steamfitters' apprentices in the employ of Southwood Mechanical Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers apprentices and steamfitters and steamfitters' apprentices in the employ of Southwood mechanical Services Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2577-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mike Belcourt and John Beresford c.o.b. as Summit Building Group (an unregistered business name) (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Mike Belcourt and John Beresford c.o.b. as Summit Building Group (an unregistered business name) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Mike Belcourt and John Beresford c.o.b. as Summit Building Group (an unregistered business name) in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2620-07-R: Labourers' International Union of North America, Local 247 (Applicant) v. 681183 Ontario Inc. o/a J M Contractor (Respondent)

Unit: "all construction labourers in the employ of 681183 Ontario Inc. o/a J M Contractor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of 681183 Ontario Inc. o/a J M Contractor in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2623-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Regal Electricians Inc. (Respondent)

Unit: "all construction labourers in the employ of Regal Electricians Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2650-07-R: The International Union of Painters and Allied Trades Local Union 1891 (Applicant) v. Paramount Drywall Services (2007) Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Paramount Drywall Services (2007) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Paramount Drywall Services (2007) Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit) *(Clarity Note)*

2693-07-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Constructions James McNeil Ltee (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Les Constructions James McNeil Ltee in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all carpenters and carpenters' apprentices in the employ of Les Constructions James McNeil Ltee in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0095-04-R; 1512-04-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Rankin Construction Inc. and Decew Construction Inc. (Respondent) v. Electrical Power Systems Construction Association, Construction Workers Union Local 150 affiliated with Christian Labour Association of Canada (Interveners)

Unit: "all construction labourers in the employ of Decew Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Decew Construction Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	1

0256-06-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. TISI Canada Inc. (Respondent)

Unit: "all employees of TISI Canada Inc. in the Province of Ontario engaged in heat treatment/stress relieving operations save and except non-working forepersons and persons above the rank of non-working foreperson" (32 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

1445-07-R: Sheet Metal Workers International Association Local Union No. 285 (Applicant) v. D & R Heating Contractors Limited and, 669857 Ontario Limited c.o.b. as Alma Mechanical (Respondents)

Unit: "all sheet metal workers, sheet metal workers' apprentices, sheeters, sheeters' assistants and material handlers in the employ of the responding party in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2124-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. 6459293 Canada Inc. c.o.b. as DB Ontario and, 9118-4457 Quebec Inc. c.o.b. as ABF (Respondents)

Unit: "all employees of 6459293 Canada Inc. c.o.b. as DB Ontario and 9118-4457 Quebec Inc. c.o.b. as ABF in the Town of Hawkesbury, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff, dispatcher and inventory control employees" (96 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	108
Number of persons who cast ballots	104
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	91
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	35
Number of ballots segregated and not counted	15

2148-07-R: Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (Applicant) v. Provincial Advocate for Children and Youth (Respondent)

Unit: "all employees of the Provincial Advocate for Children and Youth in the Province of Ontario, save and except the Provincial Advocate and the Executive Assistant to the Provincial Advocate" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	13

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2214-07-R: United Employees Association (Applicant) v. UJA Federation of Greater Toronto (Respondent)

Unit: "all employees of the United Jewish Welfare Fund of Toronto, United Jewish Appeal of Greater Toronto, and the Jewish Federation of Greater Toronto, save and except the President and CEO, Sr. Vice-Presidents, Vice-Presidents, Campaign Director, Senior Fund Executive, Director of Jewish Foundation, Director of Human Resources, Directors of Strategic Planning and Allocations, Building Manager, Executive Assistant to the President, Director Creative Department, Director Information Technology, Controller, Accountant, Payroll Administrator, Human Resources Administrator, Professional/Rabbinical staff of the Kashruth Council/Orthodox Division, Employees covered by existing Collective Agreements, Part-time employees who work less than half time and Professional employees hired for a period of less than six (6) months" (73 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	52
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2243-07-R: Service Employees International Union Local 1.on (Applicant) v. CSH Four Teddington Park Inc. (Respondent)

Unit: "all employees of CSH Four Teddington Park Inc. at 4 Teddington Park Avenue in the City of Toronto, save and except registered nurses, activity coordinator, office manager, maintenance supervisor, supervisors and persons above the rank of supervisor" (36 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	2

2287-07-R: Ontario Public Service Employees Union (Applicant) v. Royal Victoria Hospital (Respondent)

Unit: "all Diagnostic Imaging Technologists employed by Royal Victoria Hospital in the City of Barrie, save and except supervisors and persons above the rank of supervisor and persons covered by subsisting collective agreements" (63 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	8

2298-07-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Copper Cliff Manor (Respondent)

Unit: "All employees of Copper Cliff Manor in City of Greater Sudbury, save and except Supervisors and persons above the rank of Supervisor, office and clerical staff." (15 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2348-07-R: U.F.C.W. Local 333 (Applicant) v. Barber-Collins Security Services Ltd. (Respondent)

Unit: "all employees of Barber-Collins Security Services Ltd. located at 100 Ethel Avenue, Toronto, Ontario, M6N 4Z7, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2382-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. William Neilson Ltd./Ltee (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of William Neilson Ltd./Ltée at the Halton Hills Milk Pasteurizing Plant, save and except supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements" (134 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	136
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	100
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	81
Number of ballots marked in favour of intervener	19
Number of ballots segregated and not counted	0

2419-07-R: Christian Labour Association Of Canada (Applicant) v. Chartwell Seniors Housing REIT c.o.b. as Quail Creek Retirement Centre (Respondent)

Unit: "all employees of Chartwell Seniors Housing REIT c.o.b. as Quail Creek Retirement Centre in the Municipality of Renfrew, save and except Community Relations Manager, Supervisors, those above the rank of Supervisor, office and clerical staff" (18 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

2424-07-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. United Food and Commercial Workers International Union (Respondent)

Unit: "all office and clerical employees of the United Food and Commercial Workers International Union, CLC employed in the City of Toronto, save and except employees covered by subsisting collective agreements, supervisors and those above the rank, Confidential Secretaries to the National Director, Executive Assistants to the National Director, Assistants to the National Director, Collective Bargaining Representatives and Professional Staff" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

2486-07-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Forbes/Hutton Armoured Car Service Inc. (Respondent)

Unit: "all employees of Forbes/Hutton Armoured Car Service Inc. in the City of Vaughan, save and except fleet supervisors and persons above the rank of fleet supervisor, office and clerical staff" (6 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

2514-07-R: Christian Labour Association of Canada (Applicant) v. Royal Redi-Mix Inc. (Respondent)

Unit: "all employees of Royal Redi-Mix Inc. in the Town of Oakville, Ontario, save and except supervisors, persons above the rank of supervisor, dispatchers/batchers, office and sales staff" (14 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2531-07-R: Canadian Union of Public Employees (Applicant) v. St. Peter's Residence at Chedoke (Respondent) v. Ontario Federation of Health Care Workers (Intervener)

Unit: "all employees employed by the Employer at 125 Redfern Avenue (St. Peter's Residence at Chedoke), save and except Customer Service Clerks, Business Clerk, Maintenance Servicers, Registered and Graduate Nurses, supervisors and those above the rank of supervisors" (225 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	228
Number of persons who cast ballots	138
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	134
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3

Number of spoiled ballots	6
Number of ballots marked in favour of applicant	81
Number of ballots marked in favour of intervener	47
Number of ballots segregated and not counted	4

2533-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Port Arthur Health Centre Inc. (Respondent)

Unit: "all employees of Port Arthur Health Centre Inc. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, physicians and student physicians" (65 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	69
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	67
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	2

2537-07-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. AMCO Storage Inc. (Respondent)

Unit: "all full-time employees of AMCO Storage Inc. located at 85 Wilkinson Road and 25 Ivan Street, in the City of Leamington, Ontario, save and except Supervisors, those above the rank of Supervisor, Managers, Shunt Drivers, Sales, Office, Students and Clerical Staff" (16 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

Applications for Certification Dismissed Subsequent to Vote

1871-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Mondiale Development Ltd. and/or, Pinnacle International (Respondents)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2043-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Marshall Homes Corporation and/or Marshall Homes (Copperfield) Ltd. (Respondent)

Unit: "all construction labourers in the employ of the responding party in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1600-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. William Day Construction Limited (Respondent)

Unit: "all employees of William Day Construction Limited working for the company's Levack Division located in the Townships of Dowling, Fairbanks, and Levack, save and except foremen and managers, persons above the rank of foremen and managers, office, clerical, sales and technical staff." (52 employees in unit)

2042-07-R: Canadian Union of Public Employees, Local 1281 (CUPE 1281) (Applicant) v. CKLN Radio Inc. (Respondent)

Unit: "all employees of the CKLN Radio Inc. in the City of Toronto except the managerial positions" (5 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2084-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Carman Construction Inc. (Respondent)

Unit: "all employees of Carman Construction Inc. working in and out of the Greater City of Sudbury, Ontario except non-working forepersons and persons above the rank of non-working forepersons, office staff, clerical staff and sales staff" (25 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	3

2399-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. MHI Aerospace Canada Inc. (Respondent)

Unit: "all employees of MHI Canada Aerospace Inc. or MHI Aerospace Canada, Inc. in the City of Mississauga, ON, save and except supervisors, persons above the rank of supervisors and office, clerical and sales staff." (0 employees in unit)

2468-07-R: Retail, Wholesale and Department Store Union, District Council-of the-United Food and Commercial Workers International Union (Applicant) v. Chartrand's Independent Grocer (Respondent)

Unit: "all employees of Chartrand's Independent Grocer in the City of Temiskaming Shores, Ontario, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, Office Staff and those covered by an existing Collective Agreement." (90 employees in unit)

Number of names of persons on revised voters' list	107
Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	64
Number of segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	56
Number of ballots segregated and not counted	7

2485-07-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. TRW Canada Ltd. (Respondent)

Unit: "all employees of TRW Canada Ltd., in the Town of Tillsonburg, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and engineering staff and students." (281 employees in unit)

Number of names of persons on revised voters' list	280
Number of persons who cast ballots	270

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	264
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	128
Number of ballots marked against applicant	136
Number of ballots segregated and not counted	4

2515-07-R: Canadian Union of Public Employees (Applicant) v. Pride in Heritage Children's Centre (Respondent)

Unit: "all employees of the Pride in Heritage Children's Centre in the City of Toronto, save and except the Supervisor and persons above the rank of Supervisor" (12 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	4

Applications for Certification Withdrawn

1504-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Milton Valley Homes Ltd. and/or Foxglove Estates Inc. (Respondent)

0214-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Target Drywall & Acoustics Ltd. (Respondent)

1946-06-R: International Association of Heat & Frost Insulators and Asbestos Workers AFL-CIO Local 95 (Applicant) v. Insulcon Insulation Inc. (Respondent)

2358-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1614818 Ontario Inc. c.o.b. as Postma Concrete Forming (Respondent)

1058-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Ideal Railings Ltd. (Respondent)

1622-07-R: Labourers' International Union of North America Ontario Provincial District Council (OPDC) (Applicant) v. Henderson Builders Ltd. (Respondent)

1895-07-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Owen King Limited (Respondent)

1998-07-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Synergex Control Automation Inc. (Respondent)

2373-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Straight Line Forming and Crane Rental (Respondent)

2445-07-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Design Ventilation Inc. (Respondent)

2457-07-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Vicor Mechanical Ltd. (Respondent)

2582-07-R; 2583-07-R; 2485-07-R; 2585-07-R: Canadian Construction Workers' Union (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

2604-07-R; 2605-07-R: Canadian Construction Workers' Union (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

2622-07-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Modu-Loc Fence Rentals Ltd. (Respondent)

2690-07-R: Canadian Union of Public Employees (Applicant) v. The Brant Centre (Respondent) v. Ontario Federation of Health Care Workers, LIUNA, Local 1110 (Intervener)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1443-01-R; 1832-01-R; 1834-01-R; 0448-02-R; 0586-07-R: International Brotherhood of Electrical Workers Local Union 1687 (Applicant) v. Kvaerner Cementation Division, Kvaerner Canada Inc., Kvaerner Constructors Ltd., Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); Millwright Regional Council of Ontario and its Local 1425 (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Kvaerner Cementation Division, Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Kvaerner Cementation Division, Cementation Skanska Canada Inc., Cementation Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., AK Heavy Engineering, Murray & Roberts (Respondents) *(Withrawn)*

3047-05-R: United Brotherhood of Carpenters and Joiners of America Local 397 (Applicant) v. Cloke-Kirby Construction Limited, and, High Point Commercial Management Services Inc. (Respondents) *(Dismissed)*

0029-07-R: Greater Ontario Regional Council of Carpenters and Allied Trades United Brotherhood of Carpenters, Locals 494 and 1946 (Applicant) v. Walls.com Inc. and, 1690148 Ontario Inc. (Respondents) *(Endorsed Settlement)*

1929-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Planit Construction Company Inc., Rooflifters Inc. (Respondents) *(Withrawn)*

2125-07-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. 6459293 Canada Inc. c.o.b. as DB Ontario and, 9118-4457 Quebec Inc. c.o.b. as ABF (Respondents) *(Granted)*

2367-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A1 Superior Paving & Concrete Works Company Inc., Marc-Pro Contracting Ltd. (Respondents) *(Endorsed Settlement)*

SALE OF A BUSINESS

1443-01-R; 1832-01-R; 1834-01-R; 0448-02-R; 0586-07-R: International Brotherhood of Electrical Workers Local Union 1687 (Applicant) v. Kvaerner Cementation Division, Kvaerner Canada Inc., Kvaerner Constructors Ltd., Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); Millwright Regional Council of Ontario and its Local 1425 (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Kvaerner Cementation Division, Cementation Skanska Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., Davy Markham Ltd. (Respondents); Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Kvaerner Constructors Ltd., Kvaerner Canada Inc., Kvaerner Cementation Division, Cementation Skanska Canada Inc., Cementation Canada Inc., Aker Kvaerner Songer Canada Ltd., Aker Kvaerner Canada Inc., AK Heavy Engineering, Murray & Roberts (Respondents) *(Withrawn)*

3047-05-R: United Brotherhood of Carpenters and Joiners of America Local 397 (Applicant) v. Cloke-Kirby Construction Limited, and, High Point Commercial Management Services Inc. (Respondents) *(Dismissed)*

3929-06-R: United Food Commercial Workers Canada, Local 175 (Applicant) v. St. Lawrence Corporation and, Marimac Group Incorporated (Respondents) *(Withrawn)*

0029-07-R: Greater Ontario Regional Council of Carpenters and Allied Trades United Brotherhood of Carpenters, Locals 494 and 1946 (Applicant) v. Walls.com Inc. and, 1690148 Ontario Inc. (Respondents) *(Endorsed Settlement)*

1929-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Planit Construction Company Inc., Rooflifters Inc. (Respondents) *(Withrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3593-06-R: Stanislaw Pytel and Miroslaw Pryciak (Applicant) v. The International Union of Painters and Allied Trades and The Ontario Council of the International Union of Painters and Allied Trades (Respondent) v. Altet Stucco Ltd. (Intervener)

Unit: "all journeymen painters, paperhangers, fabric hangers, decorators, sandblasters, water blasters, vacuum operators, spray applicators, swing stage operators, drywall tapers, plasterers, fireproofing applicators, acoustical sprayers, asbestos removers, exterior insulated finishing system workers, exterior stucco workers, and/vapour barrier workers and their respective apprentices, trainees, foremen in the Province of Ontario." (21 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	13

Number of segregated ballots cast by persons whose names do not appear on voters' list	16
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	19

3968-06-R: Franco Parra (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Respondent) v. Romano Custom Home Framing (Intervener)

Unit: "all employees of (Romano Custom Home Framing), including carpenters and framers and their respective learners and improvers, construction labourers and pieceworkers as defined in Schedule A and B, engaged in the construction of all phases of housing including the preparation of footings, the fabrication, renovation, alteration, erection and finishing thereof, exterior trim and similar work, save and except those persons above the rank of foreman and office, clerical and engineering staff, while working in and out of the following Geographic Areas of the Ontario Labour Relations Board Area Numbers 8, 9, 10, 11, that portion of Board Area 12 which is west of the Trent Severn Waterway and 18 provided that the requirements of Letter of Understanding No. 11 are satisfied" (1 employee in unit) *(Granted)*

4010-06-R: The Employees of Electricomm Services (Ont.) Ltd. (Applicant) v. The International Brotherhood of Electrical Workers, Local 804 (Respondent) v. Electricomm Services (Ont.) Ltd. (Intervener)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers employed by Electricomm Services (Ont.) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) *(Withrawn)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	4

0006-07-R: Jaye Bergman, Ian Stark, Clint Van Wallingham, and Kyle Wilson (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Respondent) v. Jamel Contracting Ltd. (Intervener)

Unit: "all carpenters and carpenters' apprentices, other than millwrights, employed in all sectors of the construction industry save and except the ICI sector and same and except non-working foremen and persons above the rank of non-working foremen in the geographical districts of Rainy River, Kenora, Thunder Bay and that part of the District of Algoma and Cochrane north of the 49th parallel and west of the North Driftwood, Abitibi and Moose Rivers to the James Bay." (9 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	4

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

0114-07-R: Sebastiano Bianchi (et al) (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Respondent) v. Highview Plumbing Limited, Universal Workers Union, Labourers' International Union of North America Local 183 (Interveners)

Unit: "All plumbers and plumbers' apprentices in the low-rise sector of the residential sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit) *(Endorsed Settlement)*

0188-07-R; 0355-07-R: Ken Vaccher (Applicant) v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (Respondent) v. 663702 Ontario Limited o/a Reliable Electric (Intervener);

Unit: "All journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communications installers in the employ of 663702 Ontario Limited o/a Reliable Electric, in all sectors of the construction industry, other than the industrial, commercial and institutional sector, within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building; the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming; that portion of the District of Algoma south of the 49th parallel of latitude; the District of Thunder Bay; the District of Rainy River; the District of Kenora including the Patricia portion; and that portion of the District of Cochrane north of the 50th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foremen." (1 employees in unit) *(Granted)*

0420-07-R: John Pilon (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Respondent) v. Carleton Iron Works Co. Limited (Intervener)

Unit: "all iron workers and iron workers' apprentices in the employ of Carleton Iron Works Co. Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Withrawn)*

2178-07-R: Nipissing Mental Health Housing and Support Services (Applicant) v. Ontario Public Service Employees Union (Respondent) *(Withrawn)*

2279-07-R: Paul W. Charbonneau (Applicant) v. Amalgamated Transit Union, Local 279 (Respondent) v. BA International Inc. (Intervener) *(Dismissed)*

Unit: "The BA International Inc. recognizes the Amalgamated Transit Union Local 279 as the sole bargaining agent for all employees working as security guards of BA International Inc. in the City of Ottawa save and except supervisors and persons above the rank of supervisors" (16 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	0

2376-07-R: Plemon Lewis (Applicant) v. Communication, Energy and Paperworkers Union of Canada Local 100 G (Respondent) v. Atlantic Packaging Products Ltd., Communications, Energy and Paperworkers Union Of Canada (Interveners) *(Withrawn)*

2384-07-R: Caressant Care Nursing and Retirement Homes Limited Caressant Care on Mary Bucke St. Thomas, ON (Applicant) v. Service Employees International Union, Local 1.on (Respondent) v. Caressant Care Nursing & Retirement Homes Ltd. (Intervener) *(Dismissed)*

2484-07-R: Employees of (Greenlawn Memorial Gardens Limited) (Applicant) v. Service Employees International Union Local 2 (SEIU Local 2.on, Brewery, General and Professional Workers Union) (Respondent) *(Granted)*

2505-07-R: The Bargaining Unit at Lafarge Meldrum Bay (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Lafarge Construction Materials (Manitoulin) (Intervener) *(Granted)*

Unit: "Those employees of the Company employed at its Quarry in the Township of Dawson, save and except supervisors, persons above the rank of supervisors, office, technical and sales staff, cookhouse staff." (60 employees in unit)

Number of names of persons on revised voters' list	56
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	30
Number of ballots segregated and not counted	0

2660-07-R: Michael Belanger on his own behalf and on behalf of a group of employees of Cornwall Industrial Machining & Fabrication Ltd. A Division of 943009 Ontario Ltd. (Applicant) v. International Association of Machinists and Aerospace Workers Lodge 412 (Respondent) *(Terminated)*

MINISTERIAL REFERENCE

2354-07-M Meadowcroft Group (Briargate Retirement Living Centre) (Applicant) v. Service Employees' International Union, Local 1.on (Respondent) *(Withrawn)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2525-07-U: Canadian Corps of Commissionaires (Ottawa Division) (Applicant) v. Public Service Alliance of Canada (Respondent) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2613-04-U: Kym Urry (Applicant) v. Canadian Union of Public Employees Local 966 (Respondent) v. The Regional Municipality of Peel (Intervener) *(Terminated)*

4561-04-U: Shirley Vasey (Applicant) v. Ontario Nurses' Association (Respondent) v. St. Michael's Hospital (Intervener) *(Dismissed)*

1755-05-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Milton Valley Homes Ltd. and/or Foxglove Estates Inc. (Respondent) *(Withrawn)*

3956-05-U: Sheet Metal Workers' International Association Local Union 47, Rene Courtemanche and Jordan Simpson (Applicant) v. Hydracorp Canada Ltd., Gary Bekolay and Jeff Brown (Respondent) *(Withrawn)*

0621-06-U: Amalgamated Transit Union, Local 113 (Applicant) v. Toronto Transit Commission (Respondent) *(Withrawn)*

1441-06-U: Joyce Farewell (Applicant) v. United Food and Commercial Workers International Union, Locals 175 & 633 (Respondent) *(Dismissed)*

1850-06-U: Ched Gordon (Applicant) v. United Food and Commercial Workers Union Canada, Local 175 (Respondent) v. Olymel s.e.c.l.p. (Intervener) *(Dismissed)*

1947-06-U; 2149-06-U: International Association of Heat & Frost Insulators and Asbestos Workers AFL-CIO Local 95 (Applicant) v. Insulcon Insulation Inc. (Respondent); Insulcon Insulation Inc., Antonio Demelo and Nemesia Demelo (Applicant) v. International Association of Heat & Frost Insulators and Asbestos Workers AFL-CIO, Local 95 (Respondent) *(Withrawn)*

2102-06-U: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. World Journal (Daily News) Inc. (Respondent) *(Withrawn)*

2363-06-U: Tara Frater (Applicant) v. Ontario Nurses' Association (Respondent) v. North York General Hospital (Intervener) *(Withrawn)*

2569-06-U; 2571-06-U; 2573-06-U; 2574-06-U; 2599-06-U; 2618-06-U; 2619-06-U; 2620-06-U; 2665-06-U; 2693-06-U; 2703-06-U; 2716-06-U; 2721-06-U; 2723-06-U; 2725-06-U; 2726-06-: 2731-06-U; 2815-06-U; 2817-06-U; 2829-06-U; 2962-06-U; 3480-06-U; 3481-06-U; 3482-06-U; 3499-06-U; 3551-06-U; 3632-06-U; 3649-06-U; 3689-06-U; 3729-06-U: Stan Futa; Malcolm Jones; Mark Smith, Kevin Prendergast, Dan Vresk; Jerry Kocijowsky; Denise DeClerc; Christine Safranka; Ross Tennant; Leo Felicetti; Laura Reid; Kathy Cole; Nadia Futa; Jeff Lepp; John Fuller; Ronald Franklin; Doug Adams; Rose Campbell; Ian Thow; Marina Seferian; Paul Alves; Michael Weatherbee; Sharon Moran; Janet Orchard; John Cole; Kelly Wickett; James Murrell; Cathy Henry; Jo-Anne Jaekl (Applicant) v. Ontario Public Service Employees Union "OPSEU" (Respondent) v. Municipal Property Assessment Corporation (Intervener) *(Dismissed)*

2640-06-U: Gerarda Fournier (Applicant) v. CAW, Local 1285 (Respondent) v. DaimlerChrysler Canada Inc. (Intervenor) *(Dismissed)*

2701-06-U: Akalework Sebhatu and Genet Ferede (Applicant) v. United Food and Commercial Workers International Union, Local 333 (Respondent) *(Dismissed)*

2714-06-U: Fred Dragger (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 2251 and Mike Depraat (Respondent) v. Algoma Steel Incorporated (Intervener) *(Dismissed)*

3135-06-U: Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 1059 (Applicant) v. 1614818 Ontario Inc., c.o.b. as Postma Concrete Forming, Specific Utility Contractors, Christian Labour Association of Canada, Construction Workers Local 53 (Respondents) *(Withrawn)*

3300-06-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Highview Plumbing Limited and, Universal Workers Union, L.I.U.N.A. Local 183 (Respondents) *(Withrawn)*

3485-06-U: Ralph Kroepfl (Applicant) v. C.A.W. (Local 222) (Respondent) v. A.G.S. Automotive (Intervener) *(Withrawn)*

3518-06-U: Winsome Moncrieffe (Applicant) v. Canadan Union of Public Employeees and its Local 966 (Respondent) *(Dismissed)*

4071-06-U: Miriam Gallardo (Applicant) v. United Steelworkers of America, Local 9500 (Respondent) v. CFM Canada (Intervener) *(Withrawn)*

4163-06-U: Diane Gallagher (Applicant) v. CUPE Local 1999 (Respondent) v. Lakeridge Health Corporation (Intervener) *(Dismissed)*

0017-07-U: John Lourenco Diniz (Applicant) v. C.A.W. - Canada Local 1859 (Respondent) v. Delhi Industries Inc. (Intervener) *(Withrawn)*

0058-07-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Tate & Lyle Canada Ltd. (Respondent) *(Withrawn)*

0084-07-U: Bonnie Dair (Applicant) v. NuComm Marketing Inc. (Respondent) *(Dismissed)*

0569-07-U: Service Employees International Union Local 1.on (Applicant) v. Sunrise Assisted Living (Respondent) *(Withrawn)*

0666-07-U: David Andrew Carswell (Applicant) v. The Simcoe County Elementary Teachers' Federation (Respondent) v. Simcoe County District School Board (Intervener) *(Dismissed)*

0896-07-U: Victor Gouveia (Applicant) v. United Food and Commercial Workers Union Canada, Local 1000A (Respondent) v. Maple Leaf Consumer Foods, a division of Maple Leaf Foods Inc. (Intervener) *(Dismissed)*

0985-07-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. DP Electric (1996) Canada Ltd. (Respondent) *(Withrawn)*

1181-07-U: Canadian Office & Professional Employees Union Local 343 (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Withrawn)*

1281-07-U: Nicole Viardot (Applicant) v. Association des enseignantes et des enseignants franco-ontariens (AEFO-Centre-Sud catholique) (Respondent) *(Withrawn)*

1453-07-U: Kim Belyea (Applicant) v. United Food & Commercial Workers International Union (Respondent) v. The Royal Canadian Legion Branch 43 (Intervener) *(Withrawn)*

1469-07-U: The Federation of Guild Representatives (Applicant) v. CWA Canada (Respondent) *(Dismissed)*

1489-07-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Maxtech Manufacturing Inc. (Respondent) *(Withrawn)*

1496-07-U: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Ideal Railings Limited (Respondent) *(Withrawn)*

1641-07-U: Canadian Union of Public Employees and its Local 4308 (Applicant) v. Central Neighbourhood House (Respondent) *(Withrawn)*

1683-07-U: Labourers' International Union of North America, Local 527 (Applicant) v. 924241 Ontario Inc. o/a Romeo & Romeo Concrete Finishing (Respondent) *(Granted)*

1758-07-U: A.C. Concrete Forming Ltd. (Applicant) v. Universal Workers Union, L.I.U.N.A. Local 183 (Respondent) *(Dismissed)*

1796-07-U: Operative Plasterers', Cement Masons', and Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 and Steve Zarich (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Patrick D. Finley and Mary Dougherty (Respondent) *(Withrawn)*

1956-07-U: Ontario Nurses' Association (Applicant) v. Hotel Dieu Grace Hospital (Respondent) *(Withrawn)*

1961-07-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Owen King Limited and, Kris Zeehuisen (Respondents) *(Withrawn)*

1967-07-U: Robert John Byers (Applicant) v. Painters & Allied Trades District Council 46 Local 1891 (Respondent) v. Marel Contractors Ltd. (Intervener) *(Withrawn)*

1988-07-U: Dwight Hughes (Applicant) v. New-Life Mills Limited Employees' Association (Respondent) v. New Life Mills Limited (Intervener) *(Terminated)*

2141-07-U: Peter John Gilmour (Applicant) v. Canadian Union of Public Employees (Respondent) v. St. Joseph's Healthcare Hamilton (Intervener) *(Withrawn)*

2171-07-U: Labourers' International Union of North America, Local 527 (Applicant) v. Lemmo Masonry Inc. (Respondent) *(Withrawn)*

2252-07-U: Ontario Public Service Employees Union (Applicant) v. Muki Baum Association for the Rehabilitation of Multi Handicapped Inc. (Respondent) *(Withrawn)*

2308-07-U: Louise Brunet (Applicant) v. CUPE Local 4000 (Respondent) *(Terminated)*

2339-07-U: Giuseppe Norcini (Applicant) v. International Union of Operating Engineers, Local 772/796 (Respondent) *(Dismissed)*

2368-07-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A1 Superior Paving & Concrete Works Company Inc., Marc-Pro Contracting Ltd. (Respondents) *(Endorsed Settlement)*

2414-07-U: Rajindra Nandlall (Applicant) v. United Steelworkers of America and, Fenwick Automotive Products (Respondents) *(Dismissed)*

2428-07-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. MHI Canada Aerospace, Inc. (Respondent) *(Withrawn)*

APPLICATION FOR INTERIM ORDER

2427-07-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. MHI Canada Aerospace, Inc. (Respondent) v. HQ Aero Management Inc. (Intervener) *(Withrawn)*

2694-07-M: Christian Labour Association of Canada (Applicant) v. Centre D'Accueil Lise Menard (Respondent) *(Withrawn)*

JURISDICTIONAL DISPUTES

4030-06-JD: International Union of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Ellis-Don Corporation, Solarfective Products Ltd., Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and, Clearview Solutions (Respondents) *(Dismissed)*

0265-07-JD: Labourers' International Union of North America Local 493 (Applicant) v. PCL Constructors Canada Inc., Bermingham Construction Limited, United Brotherhood of Carpenters and Joiners of America Local 2486 (Respondents) *(Dismissed)*

1674-07-JD; 1793-07-JD: Labourers' International Union of North America, Local 1059 (Applicant) v. McKay-Cocker Construction Limited,, New Millennium Environmental Services Inc., and, International Union of Painters and Allied Trades (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener); Ontario Council of the International Union of Painters and Allied Trades and its Local 1590 (Applicant) v. Labourers' International Union of North America, Local 1059 and, Construction Cleaners Canada Ltd. (Respondents) *(Withrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1388-06-OH: William Symoczko and United Steelworkers Local 2020 (Applicant) v. Affinia Sudbury Corp., Shawn Samuels, Dan Hunt, Dale Bolger (Respondent) *(Terminated)*

2661-06-OH: George Cameron (Applicant) v. Wessuc Inc. (Respondent) *(Withrawn)*

0689-07-OH: Jason Gliddon (Applicant) v. Skylight Residential Inc. (Respondent) *(Withrawn)*

0984-07-OH: International Brotherhood of Electrical Workers, Local 586 and Shane Wicks (Applicant) v. DP Electric (1996) Canada Ltd. (Respondent) *(Withrawn)*

1038-07-OH: Maurice Garnett (Applicant) v. Metrix Ready Mix Ltd. (Respondent) *(Withrawn)*

1421-07-OH; 1566-07-OH: Shaun Hirdes (Applicant) v. REENA (Respondent); Christopher Moore (Applicant) v. REENA (Respondent) *(Withrawn)*

1515-07-OH: Clarence Morris A. Eshkakogan (Applicant) v. Nor Eng Construction & Engineering Inc. (Respondent) *(Withrawn)*

1876-07-OH: Stephen Knight (Applicant) v. Plastics and Signs of Ottawa (Respondent) *(Withrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

0810-05-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Rosmar Drywall & Acoustics Ltd. (Respondent) *(Granted)*

2127-05-G; 3437-05-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Jacobs Catalytic Industrial Services Limited (Respondent) v. General Presidents' Maintenance Committee for Canada, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (Interveners) International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Jacobs Catalytic Industrial Services Limited (Respondent) *(Dismissed)*

1082-06-G: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. Peninsula Maintenance Ltd., 1525859 Ontario Limited (Respondents) *(Granted)*

2710-06-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) *(Withrawn)*

0463-07-G: Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B.J. Normand Ltd. (Respondent) *(Withrawn)*

0708-07-G; 0709-07-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ottawa G.S.B. Construction Company Ltd. (Respondent); Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 124 (Applicant) v. Ottawa G.S.B. Construction Company Ltd. (Respondent) *(Terminated)*

0901-07-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. D. D'Angelo Plastering Co. (2006) Inc. (Respondent) *(Granted)*

0933-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 736 (Applicant) v. Process Group (Respondent) *(Withrawn)*

1108-07-G; 2386-07-G; 2387-07-G; 2561-07-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Highview Plumbing Limited (Respondent) *(Withrawn)*

1562-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Nor Eng Construction & Engineering Inc. (Respondent) *(Withrawn)*

1882-07-G: Brick and Allied Craft Union of Canada (Applicant) v. Kappeler Masonry Corporation (Respondent) *(Terminated)*

1930-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Planit Construction Company Inc., Rooflifters Inc. (Respondents) *(Withrawn)*

2149-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Aker Kvaerner Songer Canada Ltd. (Respondent) *(Withrawn)*

2184-07-G; 2210-07-G; 2230-07-G; 2249-07-G: Brick and Allied Craft Union of Canada, Local 1 and International Union of Bricklayers and Allied Craftworkers, Local 1 (Applicant) v. Limen Masonry Limited, Limen Group Ltd., Limen Masonry (2003) Inc., Limen Enterprises (2003) Inc., Jomil Renovations Ltd. (formerly Acmar Masonry Inc.) and, Acmar Group Ltd. (Respondents); Labourers' International Union of North America, Local 837 (Applicant) v. Limen Masonry Limited, Limen Group Ltd., Limen Masonry (2003) Inc., Limen Enterprises (2003), Jomil Renovations Ltd. (formerly Acmar Masonry Inc.) and, Acmar Group Ltd. (Respondents); Brick and Allied Craft Union of Canada, Local 2 (Applicant) v. Limen Masonry Limited, Limen Group Ltd., Limen Masonry (2003) Inc., Limen Enterprises (2003) Inc., Jomil Renovations Ltd. (formerly Acmar Masonry Inc.) and, Acmar Group Ltd. (Respondents); Labourers' International Union of North America, Local 506 (Applicant) v. Limen Masonry Limited, Limen Group Ltd., Limen Masonry (2003) Inc., Limen Enterprises (2003) Inc., Jomil Renovations Ltd. (formerly Acmar Masonry Inc.) and, Acmar Group Ltd. (Respondents) *(Terminated)*

2211-07-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Joe Da Silva c.o.b. as JD Installations/JD Cold Rooms (Respondent) *(Granted)*

2212-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Arco Sealant Company Inc. (Respondent) *(Granted)*

2231-07-G: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. El Decor Ltd. (Respondent) *(Granted)*

2244-07-G: International Union of Bricklayers and Allied Craftsmen Local 2/Brick and Allied Craft Union of Canada Local 2 (Applicant) v. Vinmod Construction Inc. (Respondent) *(Granted)*

2250-07-G: Labourers' International Union of North America, Local 493 (Applicant) v. Sudbury Cutting & Coring Ltd. (Respondent) *(Withrawn)*

2276-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rainone Construction (2007) Limited (Respondent) *(Granted)*

2297-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. D.B. Structural Inc. (Respondent) *(Granted)*

2321-07-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Youngs Architectural Glazing Ltd. (Respondent) *(Granted)*

2337-07-G: The International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Daniel Perkins c.o.b. as See Through Glass Windows & Doors (Respondent) *(Granted)*

2356-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1017828 Ontario Inc. (Respondent) *(Granted)*

2357-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Com-Kote Interiors Inc. (Respondent) *(Granted)*

2378-07-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1198934 Ontario Inc. o/a Basic Structure Engineering Glazing Contractors (Respondent) *(Granted)*

2393-07-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Granted)*

2394-07-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Granted)*

2413-07-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Cyber Electric Inc. (Respondent) *(Granted)*

2416-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Valentin Sokolov c.o.b. as Rainbow Stucco Systems (Respondent) *(Withrawn)*

2438-07-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Metro Painters (2004) Limited (Respondent) *(Granted)*

2451-07-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. A-1 Cladding Ltd. (Respondent) *(Granted)*

2458-07-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. H & R Construction (Respondent) *(Withrawn)*

2459-07-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Premier Interlocking Ltd. (Respondent) *(Granted)*

2477-07-G: IBEW Electrical Power Council of Ontario (Applicant) v. Aecon Industrial, A Division of Aecon Group Inc. (Respondent) *(Withrawn)*

2479-07-G: Labourers' International Union of North America, Local 506 (Applicant) v. Yukon Construction Inc. (Respondent) *(Withrawn)*

2491-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. P. Krytiuk & Assoc. Ltd. (Respondent) *(Granted)*

2540-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Utility Installation Ltd. (Respondent) *(Granted)*

2541-07-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Amilcar J. Nogueira o/a Deco Trim Carpentry (Respondent) *(Granted)*

2562-07-G: Brick and Allied Craft Union of Canada, Local 2 and International Union of Bricklayers and Allied Craft Workers, Local 2 (Applicant) v. Vesuvius Canada Inc. (Respondent) *(Withrawn)*

2567-07-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Aker Kvaerner Songer Canada (Respondent) *(Withrawn)*

2578-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. D.B. Structural Inc. (Respondent) *(Dismissed)*

2589-07-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Locals 721 & 765 (Applicant) v. Your Mechanical Inc. (Respondent) *(Granted)*

2645-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rene G. Roy & Sons Ltd. (Respondent) *(Granted)*

2665-07-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Applicant) v. Hydracorp Canada Ltd. (Respondent) *(Granted)*

2667-07-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Weinmann Electric Limited (Respondent) *(Granted)*

2708-07-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Kennedy Electric Limited and Kennedy Automation Limited (Respondent) *(Endorsed Settlement)*

APPEALS - EMPLOYMENT STANDARDS ACT

1225-04-ES: The Backcourt Corporation and Tanlon Management Services Inc., and Backcourt Holdings Inc. and Web Pack International Inc. (Applicant) v. Director of Employment Standards, Shams Afroz, Amanda Aide, Khalaq S. Alim, Ashleigh Ante, Kimberly A. Ashley, Tanya Bradley, Carri Cariyle, Raymond Davis, Maria Degliangeli, Rhonda M. Doyle, Terry L. Francis, John A. Garreau, Ron Grabinsky, Tomoe F. Graham, June Hann, The Estate of Joanne M. Julien, Irfan Khan, Sheila Langstaff, Cecile Larcenaire, Christianne LeBlance, Agnes Millson, Christine Morgan, Darleen Pammett, The Estate of Roy Pappin, Kamini Patel, Rabeena Raghubir, Leona M. Ramsay, Michelle Reid, Amie E. Robinson, Carol Rowe, Irene Stockie, William Tyler, Terry Wannamaker, Christie Sheridan (Respondents) v. Howard H. Thornton, Andre Toker (Interveners) *(Endorsed Settlement)*

2420-04-ES: Brehon Trade Litho Inc. (Applicant) v. Cavan Lepper, Director of Employment Standards (Respondents) *(Granted)*

3593-05-ES: Melissa Ye (Applicant) v. Praxair Canada Inc. and, Director of Employment Standards (Respondents) *(Withrawn)*

1203-06-ES: Nhung Nguyen (Applicant) v. Antomax Automotive Technologies and, Director of Employment Standards (Respondents) *(Dismissed)*

1717-06-ES: JE.L.P. Construction (Applicant) v. Mr. Mathew Crocket and, Director of Employment Standards (Respondents) *(Dismissed)*

1876-06-ES: 1360944 Ontario Inc. o/a Itravel 2000 (Applicant) v. Bincy John, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3014-06-ES: Stan Bulmer (Applicant) v. 3765181 Canada Inc. o/a Wireless Store and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3208-06-ES: Jindong Lin (Applicant) v. Topcan Inc. o/a Sushi Train and, Director of Employment Standards (Respondents) *(Granted)*

3322-06-ES: Gemma Communications LP (Applicant) v. Charanjit Batra, and, Director of Employment Standards (Respondents) *(Withrawn)*

3324-06-ES: William Connelly (Applicant) [illegible] Sleep Country Canada, and, Director of Employment Standards (Respondents) *(Dismissed)*

3544-06-ES: Louise Bougie-Parisien, Director of 94653 Canada Inc. o/a Master Electric Motors (Applicant) v. Vincent Taillon and, Director of Employment Standards (Respondents) *(Dismissed)*

3635-06-ES: Marcia Duarte (Applicant) v. State Farm Insurance, and, Director of Employment Standards (Respondents) *(Terminated)*

3693-06-ES: Bailey's Restaurant (Applicant) v. Ashley Knight-Kron and, Director of Employment Standards (Respondents) *(Dismissed)*

3726-06-ES: Paul Douglas, a director of Douglas Family Restaurant Inc. (Applicant) v. Tara MacDonald and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3745-06-ES: L'Odyssée Collège International Inc. (Applicant) v. Joanne Talbot and, Directeur des normes d'emploi (Respondents) *(Endorsed Settlement)*

3865-06-ES: Stephen Polack (Applicant) v. Allprint Ainsworth Associates Inc. and, Director of Employment Standards (Respondents) *(Withrawn)*

3910-06-ES: Eyal Hargil (Applicant) v. Antonia Bestudio and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4005-06-ES: Gaetano Fiore, a Director of Radiancy LHE Canada Inc. (Applicant) v. Raheel Shaharyar,, Rita Fournier,, Robert Christopher Jardine,, Renata Silvestri,, Danny Gootgarts, Cindy Gouveia and, Director of Employment Standards (Respondents) *(Dismissed)*

4166-06-ES: Tanya Phillips (Applicant) v. Linis Sales Inc. operating as Canadian Tire and, Director of Employment Standards (Respondents) *(Granted)*

4182-06-ES: Christine Poole (Applicant) v. DiVinci's Hair & Tanning Gallery and, Director of Employment Standards (Respondents) *(Granted)*

0026-07-ES: Ken Shaw Motors Limited (Applicant) v. Daren Nietupski, and, Director of Employment Standards (Respondents) *(Terminated)*

0165-07-ES: Campus Colour Inc. o/a Blade Cutters Professional (Applicant) v. Harold Rehel, Vanessa Wilson, Robert Harrison and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0215-07-ES: Rodelia Beltran (Applicant) v. Erwin & Joy Rivera and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0303-07-ES: Natalia Moliboga (Applicant) v. Aqua Pure Systems Company and, Director of Employment Standards (Respondents) *(Terminated)*

0321-07-ES; 0323-07-ES: Samuel M. Cini a Director of 865331 Ontario Limited o/a Signage Systems (Applicant) v. Director of Employment Standards, Ronald Airdrie, Bruce Ashley, Stephen Ashton, Michael Axon, Andrew Azzopardi, Dwayne Benjamin, Vickram Bisnath, Frank Boucher, Victor Bulario, Joe Caputi, Steven Chevalier, Walter Chomik, Walter Wilson Cole, Barry Compton, Jim Cousineau, Matthew Cousineau, Kelly Couvillon, Jeffery Crawford, Joe Crawford, Zack Cregov , Vincent Crisanti, Robert De Lima, J Frank Deidun, Michael DeQuilla, Manuel Desimas, Ranjit Dhillon, Bryan Donegani, David Doyle, John Eldridge, Andrew Elz, Rob Farnell, Rakesh Kumar Gupta, Jeffery Guy, Mike Hadley, Mark Hamilton, Chris Hobbs, Brian Edward Holmes, Douglas Jackett, Alex Jaramillo, Janusz Kasak, Shukrulla Khan, Steve Kikot, James Kinman, Rob Kokosarevic, Henry Kowalski, Rupert Lewis, Wen Li, Kuljinder Mann, Vincent Mareino, Dan Marshall, Ed Medeiros, David Meecham, Peter Melo, Blake Mitchell, Drew Mitchell, Kent Mitchell, Tim Monk, Wayne Oakley, Michael Oliveira, Camilo Paez, Rick Patrick, Gaston Pelletier, Angelo Pereira, Joe Pimentel, Hassan Pours, Paul Ramcharran, Shamsher Randhawa, Michelle Rebelo, Christopher Rhodes, Frank Rhodes, Diego Robolino, Dave Roden, Vladimir Rozhuk, Daniel Neil Russell, Byron Sandoval, Amin Shamuon, Narendra Singh, Richard Smith, John Soares, Nat Solomon, Glen Squires, Peter Stogre, Mark Swiatlowski, Alex L Szabo, Sarvananthan Thiru, Loxley Thompson, Pedro Torres, Chan Tran, Khuon Truong, Rob Vanderstar, Glen Vezina, Eric Viegener, Ed Wallace, Ken Walsh, Wen Kwang, Gordon Wilson, Leonard Wren, Peter Wyllie, George Young, Paul Proninc, Alex F. Szabo (Respondents); Cheryl A. Hughes a Director of 865331 Ontario Limited o/a Signage Systems (Applicant) v. Director of Employment Standards, Ronald Airdrie, Bruce Ashley, Stephen Ashton, Michael Axon, Andrew Azzopardi, Dwayne Benjamin, Vickram Bisnath, Frank Boucher, Victor Bulario, Joe Caputi, Steven Chevalier, Walter Chomik, Walter Wilson Cole, Barry Compton, Jim Cousineau, Matthew Cousineau, Kelly Couvillon, Jeffery Crawford, Joe Crawford , Zack Cregov, Vincent Crisanti, Robert De Lima, J Frank Deidun, Michael DeQuilla, Manuel Desimas, Ranjit Dhillon, Bryan Donegani, David Doyle, John Eldridge, Andrew Elz, Rob Farnell, Rakesh Kumar Gupta, Jeffery Guy, Mike Hadley, Mark Hamilton, Chris Hobbs, Brian Edward Holmes, Douglas Jackett, Alex Jaramillo, Janusz Kasak, Shukrulla Khan, Steve Kikot, James Kinman, Rob Kokosarevic, Henry Kowalski, Rupert Lewis, Wen Li, Kuljinder Mann, Vincent Mareino, Dan Marshall, Ed Medeiros, David Meecham, Peter Melo, Blake Mitchell, Drew Mitchell, Kent Mitchell, Tim Monk, Wayne Oakley, Michael Oliveira, Camilo Paez, Rick Patrick, Gaston Pelletier, Angelo Pereira, Joe

Pimentel, Hassan Pours, Paul Ramcharran, Shamsher Randhawa, Michelle Rebelo, Christopher Rhodes, Frank Rhodes, Diego Robolino, Dave Roden, Vladimir Rozhuk, Daniel Neil Russell, Byron Sandoval, Amin Shamuon, Narendra Singh, Richard Smith, John Soares, Nat Solomon, Glen Squires, Peter Stogre, Mark Swiatlowski, Alex L Szabo, Sarvananthan Thiru, Loxley Thompson, Pedro Torres, Chan Tran, Khuon Truong, Rob Vanderstar, Glen Vezina, Eric Viegener, Ed Wallace, Ken Walsh, Wen Kwang, Gordon Wilson, Leonard Wren, Peter Wyllie, George Young, Paul Proninc, Alex F. Szabo (Respondents) *(Withrawn)*

0533-07-ES: The Great Canadian Bungee (1992) Corporation (Applicant) v. Joel Turcotte and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0534-07-ES: Rita Chaterpati (Applicant) v. Plastic Moulders Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

0739-07-ES: Vari-Form Inc. (Applicant) v. Gregory Francis and, Director of Employment Standards (Respondents) *(Withrawn)*

0888-07-ES: Patrick Murray, a Director of Teo Corp. (Applicant) v. Ron Capponi,, Georgina Murray,, Marjula Selvakumaran,, Xiaohong Shen,, Karamchen Persaud,, Yingyang Su,, Veselinka Bijedic,, Rohanie Nandlall,, Lynn McKinley, Ramanand Shivram,, Chitranie Shivram,, Darren Walsh,, D. Jadorie,, Parmanand Jairam,, Victor Ramroop, Renita Nandlall,, J. Dhaliwal,, Elaine Jawahir,, Charanjit Phagura,, Karamjit Sandhu,, Harjinder Chauban,, Cher Persaud,, Sukhjit Bhangoo,, Bryan Dawkins,, Jamail Singh Ranchews and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0902-07-ES: Contex Roofing Company Ltd. (Applicant) v. Shawdover Hervolist and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1062-07-ES: Jeffrey Ryan Pickles o/a JSA Property Management (Applicant) v. Hans Rensch, and, Director of Employment Standards (Respondents) *(Dismissed)*

1063-07-ES: Botezatu Petru (Applicant) v. Bon Ferro Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1085-07-ES: Pro Glo Paints Ltd. (Applicant) v. Diana Finley and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1194-07-ES: Logue Mechanical Services Ltd. (Applicant) v. Andrew McInnis and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1222-07-ES: Classic Software Systems Inc. Designworks International Limited (Applicant) v. Brigette Durrant and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1380-07-ES: Alexander Coutts (Applicant) v. 1346580 Ontario Inc. o/a Coffee Time Donuts and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1413-07-ES: J.R.F. International Inc. (Applicant) v. Lisa Clarke and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1428-07-ES: Geza Kalman Jr (Applicant) v. B & B Custom Fabricating and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1433-07-ES: 1332127 Ontario Inc. o/a Premier Fitness (Applicant) v. Brett Scholl and, Director of Employment Standards (Respondents) *(Terminated)*

1435-07-ES: Colleen Carr (Applicant) v. Goodwill Niagara and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1457-07-ES: John Homan (Applicant) v. Greeley Containment and Rework Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1458-07-ES: Ann Homan (Applicant) v. Greeley Containment and Rework Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1459-07-ES: Barbara Wood (Applicant) v. Greeley Containment and Rework Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1572-07-ES: Teresa Kowalczyk (Applicant) v. The Hudson's Bay Company and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1573-07-ES: 2090701 Ontario Corp. o/a South Beach Spa (Applicant) v. Michael D'Urzo and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1609-07-ES: 1650990 Ontario Inc. o/a Tate's Inc. (Applicant) v. Erin Lintner and, Director of Employment Standards (Respondents) *(Dismissed)*

1626-07-ES: W.I. Villager Ltd. (Applicant) v. Keith Frost and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1629-07-ES: Sum Phase Trading Inc. o/a Advance Vet Lab (Applicant) v. Laura Kewell and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1705-07-ES: Jason Phillip Duke, a director of 1231594 Ontario Limited operating as Level Corp Ontario (Applicant) v. Donald Wilson and, Director of Employment Standards (Respondents) *(Dismissed)*

1728-07-ES: Isabel Dixon (Applicant) v. Survivors Psychiatric Advocacy Network and, Director of Employment Standards (Respondents) *(Withrawn)*

1763-07-ES: David R. McGill (Applicant) v. Proteus Craftworks Inc. and, Director of Employment Standards (Respondents) *(Withrawn)*

1767-07-ES: Family Vacation Centers Ltd. (Applicant) v. Erin McCafferty and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1769-07-ES: Mohinder Virk director of 6378650 Canada Inc. (Applicant) v. Randy Broadworth, Director of Employment Standards (Respondents) *(Dismissed)*

1818-07-ES: Ryan Punit (Applicant) v. Swiss Chalet and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1820-07-ES: Mohamed Ali (Applicant) v. Dana Trading Company, and, Director of Employment Standards (Respondents) *(Dismissed)*

1828-07-ES: Le Gourmand Inc. (Applicant) v. Meredith Scott, Director of Employment Standards (Respondents) *(Terminated)*

1850-07-ES: Active Kidz Daycare Centre Inc. (Applicant) v. Julie Ducharme and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1851-07-ES: Mrs. Sharon Dukowski (Applicant) v. Pareto Corporation, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1925-07-ES: O'Neill Inc. (Applicant) v. Joe Oresti and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1927-07-ES: Sabouhi Academy of Art and Design (Applicant) v. Tina Boateng and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1943-07-ES: 510582 Ontario Inc. c.o.b. Trans Canada Hotel (Applicant) v. Eric Jolly and Suzzanne Millikin and, Director of Employment Standards (Respondents) *(Terminated)*

1993-07-ES; 1994-07-ES; 1995-07-ES; 1996-07-ES; 1997-07-ES: Precinda Ltd. o/a KK Precision (Applicant) v. Ken Robertshaw and, Director of Employment Standards (Respondents); Precinda Ltd. o/a KK Precision (Applicant) v. Shannon Bousfield and, Director of Employment Standards (Respondents); Precinda Ltd. o/a KK Precision (Applicant) v. Donald Nugent and, Director of Employment Standards (Respondents); Precinda Ltd. o/a KK Precision (Applicant) v. Blair Rowsell and, Director of Employment Standards (Respondents); Precinda Ltd. o/a KK Precision (Applicant) v. Yoganand Dass and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2014-07-ES: Camptech II Circuits Inc. (Applicant) v. Wing Too Shum and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2045-07-ES: Thu Nguyen (Applicant) v. Canadian Office Products Association/COPA and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2071-07-ES: Home Fusion Inc. (Applicant) v. Megan Coleman and, Director of Employment Standards (Respondents) *(Dismissed)*

2102-07-ES: Jorg Martin Ernst (Applicant) v. Nucomm International and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2153-07-ES: Agatha Williams (Applicant) v. Spectrum Health Care Agency and, Director of Employment Standards (Respondents) *(Dismissed)*

2205-07-ES: Diana Thoms (Applicant) v. H & W Associates Janitorial Services and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2263-07-ES: Superior Blend Coffee Ltd. (Applicant) v. Peter Yule and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2315-07-ES: Masih Tufail (Applicant) v. Pacific Building Maintenance Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

2440-07-ES: Syed Mohammad Zubair Ali (Applicant) v. Netcor Communications International Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2472-07-ES: Karoly Kristof Sr. (Applicant) v. Frontier Manufacturing Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2498-07-ES: Berardino Lombardi, Director (Applicant) v. Qaibe Abbas, Nick Agostino, Seeta Ali, Juan Astudillo, Carlos Carranza, Jose Carranza, Sergio Castillo, Al Chabassol, Douglas M Cooper, Robert Coulter, Dorothy R Dagenais, Daryl D'Cruz, Brian Dickenson, Zulfiqar Abbas, Amanda Dipardo, Paul Dmitruk, Tom Dmitruk, Rick Doodhnaught, Oscar Gonzalez, Namir Goria, Irvin Haydl, Collin Homer, Lorena Hurtado, Renee Jackson, Akbar

Janmohammad, Simon Jones, John Kaye, Charles Kearsley, Hassan Khan, John Ladd, Charles Lamb, Ryan Lamb, Donald Leroux, Stephen Leslie, Paul Liang, Beradino Lombardi, Emilio Ricardo Lombrdi, Frank Lombardi, Manuela Lombardi, Stamatis Maillis, Shawyn Mann, Fabio Mariani, Arminda Mateus, Leslie Mayer, Patricia Mucha, Shawn Sean O'Leary, Armen Onnik, Kevin J Parish, Carla Perucelli, James Peters, Gerald Potoma, Susan E Ransom, Relhan A Rodrigues, Eric Rojas, Paul Roussy, Salovatore Talarico, Luis B Trujillo, Anthony Villella, Bill Watts, Vivian Wilmore and, Director of Employment Standards (Respondents) *(Terminated)*

2587-07-ES: The Cow and Sow Eatery (Applicant) v. Shauna Liscombe and, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

0817-07-HS: Carwell Construction Limited (Applicant) v. Labourers' International Union of North America, Local 1059, and, Bruce Proper, Inspector (Respondents) *(Dismissed)*

1082-07-HS: International Brotherhood of Electrical Workers, Local 120 on its own behalf and on behalf of its member Wil Pawlowski (Applicant) v. Alberici Constructors Ltd., Toyota Motor Manufacturing Canada Inc. and, Henry Puhr, Inspector (Respondents) *(Withrawn)*

2076-07-HS: Gulick Forest Products Limited/Grant Gulick (Applicant) v. Steve Brennan, Inspector (Respondent) *(Withrawn)*

2236-07-HS: Vinemount Quarry (Applicant) v. James Milne, Inspector (Respondent) *(Dismissed)*

2313-07-HS: Central North Correctional Centre (Applicant) v. Ontario Public Service Employees Union and, Joe Zaher, Inspector (Respondents) *(Granted)*

2432-07-HS: Walmart Canada Corporation (Applicant) v. Ron Elliot, Inspector (Respondent) *(Dismissed)*

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

2039-07-M: Retirement Residences Operations (REIT) LP Meadowcroft Place (Fergus & Fieldgate) (Applicant) v. Canadian Health Care Workers (Respondent) *(Granted)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

1234-06-PS: Ontario Nurses' Association (Applicant) v. The Kensington Eye Institute (Respondent) v. University Health Network, Mount Sinai Hospital, Sunnybrook Health Sciences Centre, C.U.P.E. Local 5001, SEIU Local 1 (Interveners) *(Dismissed)*

3160-06-PS; 1056-07-PS; 1332-07-PS: Ontario Nurses' Association (Applicant) v. North East Community Care Access Centre Near North Community Care Access Centre Timiskaming Community Care Access Centre Algoma Community Care Access Centre Cochrane Community Care Access Centre Manitoulin-Sudbury Community Care Access Centre West Parry Sound Community Care Access Centre, Canadian Union of Public Employees, Ontario Public Service Employees Union (Respondents); North East Community Care Access Centre (Applicant) v. Muskoka Algonquin Health Care, Ontario Nurses' Association, Ontario Public Services Employees' Union, Canadian Union of Public Employees (Respondents); North East Community Care Access Centre (Applicant) v. West Parry Sound Health Centre, Ontario Public Service Employees' Union (Respondents) v. Ontario Nurses' Association (Intervener) *(Granted)*

3161-06-PS: Ontario Nurses' Association (Applicant) v. South East Community Care Access Centre Kingston, Frontenac, Lennox and Addington Community Care Access Centre Hastings and Prince Edward Counties

Community Care Access Centre Lanark, Leeds and Grenville Community Care Access Centre, Canadian Union of Public Employees (Respondents) v. Service Employees International Union, Local 1.on (Intervener) *(Granted)*

1735-07-PS: Ontario Nurses' Association (Applicant) v. Central Care Corporation (Respondent) *(Endorsed Settlement)*

APPLICATIONS FOR ACCREDITATION

0515-07-R: Electrical Power Systems Construction Association (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent) v. Mechanical Contractors Association of Ontario, Power Workers' Union CUPE Local 1000, CLC, Labourers' International Union of North America, Ontario Provincial District Council, Canadian Union of Skilled Workers (Interveners) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0467-05-ES; 0546-05-ES: 1322396 Ontario Inc. (Applicant) v. David Newmark and, Director of Employment Standards (Respondents); David Newmark (Applicant) v. 1322396 Ontario Inc. (Pioneer Petroleums) and, Director of Employment Standards (Respondents) *(Dismissed)*

0680-05-ES: Collective Minds Consulting Inc. (Applicant) v. Bill Albert, Shannon Allhusen, Leah Bachelder, Stephen Barrett, Anthony Bartone, Michael Bennison, Julien Bouchard, David Boucher, Marc Brazeau, Kris Brunet, Colin Byham, Jamy Cartwright, Jeff Charbonneau, Colleen Charland, Lise Corbeil, Shari Defrancesco, Laina Dominelli, Chris Doyle, David Drysdale, Kent Duchesne, Jeff Dufresne, Steven Dufresne, Rachelle Duguay, Michael Foucault , Chad Franklin, Roger Gagne, Krystal-Lyn, Jeff Goguen, James Gough, Trayz Gredner, Paul Harding, Michael Harney, Gordon Helson, Robert Heroux, Cathy Hogan, Csaba Horvath, Dave Houston, James Keir, Jim Kirk, Jason Kruckel, Tyler Lance, Gord Laporte, Rick Larochelle, Mike Legault, Tammy Legault, Michael Lippel, Shane Macdonald, Ian MacPhee, Robert Martin, Marc Mayotte, Jeff McCann, David Mewett, Terry Moore, Robert Morrow, Jaana Munroe, Kelli Murray, Jordan Neal, Dave Peters, Edward Price, Nick Reed, Anthony Romaine, Kathleen Ross, Roy Sommer, Shelly Tillotson, Rachel Toeppner, Anthony Van Oosten, Blaine Vautour, Sandra Vezina, Director of Employment Standards (Respondents) *(Granted)*

3754-05-ES: Tony Shearing (Applicant) v. James Way Construction Inc., and, Director of Employment Standards (Respondents) *(Dismissed)*

1082-06-G: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. Peninsula Maintenance Ltd., 1525859 Ontario Limited (Respondents) *(Dismissed)*

1490-06-ES; 1491-06-ES: Puri Sons Inc. o/a Tally-Ho Manor (Applicant) v. Michael DiVito and, Director of Employment Standards (Respondents); Puri Sons Inc. o/a Tally-Ho Manor (Applicant) v. Shontelle Tyo and, Director of Employment Standards (Respondents) *(Dismissed)*

1623-06-ES: Giuseppe F. Tedesco (Applicant) v. Joe Bone's Grill Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2413-06-ES: Jeffrey R. McNutt (Applicant) v. 1512081 Ontario Limited o/a Abrams Towing, Director of Employment Standards (Respondents) *(Granted)*

3155-06-G: Labourers' International Union of North America, Local 625 (Applicant) v. Rock Concrete (Respondent) *(Granted)*

3371-06-U: Kris Persad (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. The Toronto Transit Commission (Intervener) *(Dismissed)*

3460-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. Don Cordingley Gradall Rental Ltd. (Respondent) *(Granted)*

PAY EQUITY ACT

2405-07-PE: Dianne L. Gaudreau (Applicant) v. District School Board Ontario North East, Canadian Office & Professional Employees Union Local 429 (Respondents) *(Withrawn)*

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